Belmont Law Review

Volume 8 Article 7

4-16-2021

# Constitutional Limits on Administrative Agencies in Cyberspace

Jon M. Garon

# CONSTITUTIONAL LIMITS ON ADMINISTRATIVE AGENCIES IN CYBERSPACE

JON M. GARON*

*Changes in technology and economic power have radically shifted the media landscape in the United States and throughout the world. Despite this, the regulatory model being used was adopted in 1996 at the dawn of the Internet age or inherited from Congresses earlier legislative efforts. This article assesses the constitutional enforcement of existing administrative regulations and address the incongruities between the current administrative practices, the public expectations of the government, and the free press for the next generation.*

*Despite a long history of governmental mistrust, the independent press and the self-regulated entertainment industries have had a tremendous role in shaping the culture and economy of the United States. At certain points in United States history, the government has attempted to regulate aspects of the free press and the entertainment media, notwithstanding the constitutional mandate of the First Amendment. The conflict between free speech and free media began early in United States history with the Alien and Sedition Acts passed in 1798. The conflict has played a significant role in the development of defamation laws, privacy laws, intellectual property laws, and telecommunications regulations, including those which led to the formation of the Federal Communications Commission (FCC) and the Patent and Trademark Office (PTO).*

*Perhaps the most notorious example of the effort to regulate news, entertainment, and public expression arose during the operations of the House Un-American Activities Committee (HUAC) and the Senate Government Operations Committee Subcommittee on Investigations led by Senator Joe McCarthy. Through the anti-communist witch-hunts of HUAC*

* Professor of Law, Nova Southeastern University Shepard Broad College of Law; J.D. Columbia Law School 1988. This article was prepared as part of the Belmont Law Review Symposium, Contemporary Issues in Administrative Law, January 15, 2021. The author wishes to thank his research assistant, Feng Xiao, for his assistance with the development of the article.

*and the McCarthy hearings, thousands of entertainers, teachers, and other professionals were fired or imprisoned for their political beliefs.*

*In a series of legislative actions during the 1990s, the federal government sought to regulate the Internet in much the same manner as it had previously sought to regulate motion pictures, comic books, television, trademarks, and the press. The Communications Decency Act and the Child Online Protection Act reflected a broad-based attempt to regulate the Internet, but these laws were found unconstitutional in Reno v. American Civil Liberties Union.[1] The Supreme Court did not strike down section 230 of the Communications Decency Act, which reversed common law privacy and defamation law for online publishers. Similarly, despite the decision in Reno, in the same year the Supreme Court upheld limited content regulation on broadcast and cable television.[2]*

*Much has changed since 1997, however, including the emergence and dominance of social media publishers such as Facebook, Twitter, YouTube, and other global enterprises that dominate access to journalism, entertainment, and public discourse. These companies regularly run afoul of regulations regarding data privacy and customer disclosure framed under Section 5 of the Federal Trade Commission Act (FTC Act) and similar state laws. In addition, broadcast and cable television systems, regulated under Turner, are becoming Internet streaming and downloading platforms, distributing programs in a format that may radically change the basis on which the Telecommunications Act bases its jurisdiction.[3]*

*This article addresses the change in media and the changing role of the FCC and Federal Trade Commission (FTC). It highlights the trend to exert content and viewpoint control on protected speech and identifies the limited role for administrative agencies going forward.*



1. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 849 (1997).
2. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 225 (1997).
3. *See* Joseph L. Gattuso, *The United States Telecommunications Act of 1996*, GLOBAL COMMS. INTERACTIVE (1998), [https://perma.cc/TZ2H-UJXN].

## INTRODUCTION

Despite the strong prohibition of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . .,"[4] Congress has made many efforts to do so in the past and continues to do so through administrative agencies such as the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC). The government actions sometimes come from executive action, while at other times they are promoted by committees of both the House and Senate. Congress uses its hearing process to create public pressure on citizens, using public pressure to achieve a result that would otherwise be barred by constitutional protections.

The efforts to regulate culture and morality through laws, executive actions, administrative policies, and public hearings began with the founding of the republic. At the same time, however, the twenty-first century understanding of the Bill of Rights has substantially expanded the rights of citizens to be free from interference by the government, shifting the tools for the state's regulatory power away from legislation and towards actions that have fewer safeguards. These efforts are highlighted by the use of interim regulatory guidelines and executive orders, neither of which has significant public oversight or control.

Section one of this article briefly reviews the history of morality legislation, including the Alien and Sedition Acts, the McCarthy Hearings, the Title IX regulations of 2012-18, and the restriction on the Paycheck Protection Program (PPP) loans for the adult entertainment industry. Section two then looks at the significant shifts in popular culture driven by the rise of social media and the decline of terrestrial broadcasting, which is the basis for many of the FCC regulations. Section three maps the intersection between the political practice of legislating morality under the current interpretation of the Bill of Rights and the modern online public sphere. In doing so, the article posits that the expansion of the individual rights promoted by the Supreme Court's interpretation of case law under the First Amendment, Second Amendment, and Fourteenth Amendment, coupled with the lack of the government's ability to craft narrowly tailored regulations for social media, online content, and privacy interests, leave the state powerless to diminish or regulate communications or interactions on the Internet. At the same time, however, there remain traditional common law protections for individuals that are as significant as those rights protected by the Constitution. Congress—but not the administrative agencies—does have the power to reduce preferential treatment to the tech sector by curtailing the laws it enacted in the 1990s to promote the emergence of these industries.

4. U.S. CONST. amend. I.

## I. CONTENT AND VIEWPOINT REGULATION FROM THE FOUNDING OF THE NATION TO TODAY

The history of efforts to regulate the press and media of the nation is as old as the nation itself. Within ten years of the passing of the Bill of Rights, the Federalist Congress passed the Alien and Sedition Acts, designed to thwart public support for the bloody revolutionary zeal sweeping Europe and to undermine the political aspirations of Thomas Jefferson's Republican efforts to remove the Federalists from power.[5] As vice president, Jefferson led the Republicans against the Federalist President, John Adams, and the Federalist Congress which was only nominally loyal to his party. Jefferson and the Republicans favored support of France despite the violence of its revolution and threat to export its military enlightenment to neighboring nations through war and terrorism. The Federalists, in support of the United States' former enemy, Great Britain, looked to a new alliance to stabilize trade and to shore up its political fortunes.[6]

To address the threat of revolution being imported into the United States from abroad, Congress enacted a series of four laws: The Alien Act, the Sedition Act, the Nationalization Act, and the Alien Enemies Act.[7] Of these, the Sedition Act was the most direct assault on speech. It provided criminal sanction for anyone who would write or publish "any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . or the President . . . with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States."[8]

Understood as political weapons rather than wartime protections, the Alien and Sedition Acts resulted in a public outcry against the

---

5. *See* Kurt T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 OHIO ST. L.J. 435, 438 (2007) ("Swept up in the fear and political momentum of a cold war with France, the Federalist Congress, under the leadership of President John Adams, passed the Alien and Sedition Acts, which authorized the removal of dangerous aliens and effectively criminalized political dissent.").

6. *See* Joseph Russomanno, *The Right and the Duty: Jefferson, Sedition and the Birth of the First Amendment's Central Meaning*, 23 COMM. L. & POL'Y 49, 65 (2018) (quoting GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 16 (2004)) (describing the political drama against "an 'atmosphere of fear, suspicion, and intrigue'").

7. Alien Act of 1798, ch. 58, § 1, 1 Stat. 570, 570–71 (1798) (expired 1801) (authorizing deportation of any foreigner deemed dangerous to national security); Sedition Act of 1798, ch. 74, 1 Stat. 596 (expired 1801); Naturalization Act, ch. 54, 1 Stat. 566 (repealed 1802); Alien Enemies Act, ch. 66, 1 Stat. 577 (expired 1802).

8. Sedition Act of 1798, 1 Stat. 596.

incumbent Federalist regime and provided Jefferson the platform needed to reverse the Federalist monopoly over the newly formed nation. Biographers, David McCullough[9] and Ron Chernow,[10] both note that these provisions were among the gravest of political mistakes made by Adams and the most harmful to his legacy, his "Achilles' heel."[11]

The zealous efforts to stop the press from attacking the Federalists backfired, prompting the growth of many additional Republican newspapers and publications. The use of the Sedition Act to stop the perceived harms caused by the sometimes vitriolic press resulted in two dozen successful actions, but there were also many more under common law defamation and various state laws.[12] Worse, the prosecutions chosen under the Sedition Act were closer to the type of seditious speech against the sovereign that had been put aside as part of the revolutionary war, rather than the knowingly false, factual speech considered defamatory today.[13]

While the Sedition Act was clearly intended to be a law to suppress speech, many of its critics focused on the use of federal law to govern libel, which was a state police power not granted to the federal government.[14] Jefferson was a fierce advocate of states' rights, and he adhered to the James Madison view of the nation's need for competing factions as the bullwork against a tyrannical federal government.[15] Continued state sovereignty was one of these key components.

James Madison describes the cause and cure in The Federalist Paper number ten:

> Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that

9. DAVID MCCULLOUGH, JOHN ADAMS 504–06 (2001).

10. RON CHERNOW, ALEXANDER HAMILTON 569 (2004).

11. Wendell Bird, *New Light on the Sedition Act of 1798: The Missing Half of the Prosecutions*, 34 LAW & HIST. REV. 541, 541 (2016) (providing scholarship to establish that there were likely closer to thirty prosecutions under the common law and the Sedition Act instead of the seventeen most historians attributed to the actions.).

12. *See* David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1710–12 (1991).

13. *See id.* at 1711 ("None involved the sort of personal slander today thought of as libel. . . . Matthew Lyon . . . was convicted on the basis of two letters to the editors of newspapers . . . attack[ing] Adams' 'continual grasp for power' and his 'unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice.'").

14. *Id.* 1711–12 ("Just as the Anti-Federalists had feared, a national government bent on consolidating power sought to use censorship to short-circuit political checks on its expansionist ambitions.").

15. *Id.* 1709–13.

> measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. . . .
>
> The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended. . . .
>
> The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.
>
> In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. . . .[16]

Had the Sedition Act been declared unconstitutional or truly repudiated, it might have been an early turning point in the development of free speech jurisprudence. But despite the opprobrium in which these Acts were held, the laws were never struck down for violating the Constitution.[17]

---

16. THE FEDERALIST NO. 10 (James Madison).

17. *See*, *e.g.*, United States v. Callender, 25 F. Cas. 239, 255 (C.C.D. Va. 1800) (No. 14,709) ("I cannot conceive that a right is given to the petit jury to determine whether the statute (under which they claim this right) is constitutional or not. . . . I cannot possibly believe that congress intended, by the statute, to grant a right to a petit jury to declare a statute void. . . . [T]his right is expressly granted to the judicial power of the United States, and is recognized by congress by a perpetual statute."); *see also* Yassky, *supra* note 12, at 1711 ("The Supreme Court, in an act of cowardice spurred, perhaps, by its institutional insecurity (*Marbury* being five years in the future), refused to hear argument on the constitutionality of the Sedition Act; indeed, every Justice on the all-Federalist Court expressed approval of the Act in opinions delivered on circuit.").

"To the contrary, throughout the first 150 years of the First Amendment, federal courts regularly enforced severe restrictions on citizens' ability to speak freely."[18]

Moreover, as noted by the common law cases brought during the period and the numerous cases brought by Federalists and Republicans alike under state laws,[19] the concern was about the power of the federal government to enter into a regulatory domain controlled by the states, rather than concerns over the power of the state to suppress seditious speech. This was true even at the top of the Republican ticket. "Jefferson never protested against the substantive law of seditious libel, not even during the later Sedition Act controversy. He directed his protests at that time against national as opposed to state prosecutions for verbal crimes."[20]

The governmental power to regulate seditious libel did not dissipate through the disrepute of the Alien and Sedition Acts. More than a century later, Socialist Party champion Eugene Debs received a ten-year prison sentence for his opposition to the United States involvement in World War I under the Espionage Act, the twentieth-century successor to the Alien and Sedition Acts.[21]

Justice Oliver Wendall Holmes laid the groundwork for Deb's conviction in an earlier case the same year. In *Schenck v. United States*,[22] Justice Holmes articulated the basis for the World War I sedition cases in language that could easily have defended the Alien and Sedition Acts as well:

---

18. Yassky, *supra* note 12, at 1700; *see also* Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 165–66 (1961) ("The 'balancing test' of First Amendment freedoms is said to justify laws aimed at the advocacy of overthrow of the Government 'as speedily as circumstances would permit.' Thus, the 'test' being used here is identical to the arguments used to justify the Alien and Sedition Acts of 1798. . . . The unprecedented incorporation into our constitutional law of this time-worn justification for tyranny has been used to break down even the minimal protections of the First Amendment forged by Mr. Justice Holmes and Mr. Justice Brandeis which would bar prosecution for speech or writings in all cases except those in which the words used 'so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.'").

19. *See* NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 61–64 (1986).

20. LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 109 (1999).

21. Debs v. United States, 249 U.S. 211, 212–16 (1919) ("The defendant . . . said that the master class has always declared the war and the subject class has always fought the battles—that the subject class has had nothing to gain and all to lose, including their lives; that the working class, who furnish the corpses, have never yet had a voice in declaring war and have never yet had a voice in declaring peace.").

22. Schenck v. United States, 249 U.S. 47 (1919).

> It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose. . . . We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights.
>
> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.[23]

The Espionage Act had a broader impact on speech. The law contained prohibitions on obtaining information, taking photographs, copying descriptions, or otherwise collecting data that could be used to harm the national defense or provide an advantage to foreign nations.[24] The law was also used to deny access to the mail system. By 1918, "74 newspapers had been denied mailing privileges."[25] In comparison, the government used the Espionage Act much more widely during World War I than it used the Alien and Sedition Acts in 1800 or the government used the Espionage Act during World War II. During World War I "some fifteen hundred prosecutions were carried out under the Espionage and Sedition Acts, resulting in more than a thousand convictions."[26]

Justice Holmes moved away from his own approach in *Abrams v. United States*,[27] not because he was repudiating his recently articulated "clear and present danger" test but because the Yiddish leaflet calling President Wilson a coward and hypocrite, and its call to action for a general strike, had no practical consequence.[28] Whether or not the dissent by

---

23. *Id.* at 51–52, *see also* United States v. Am. Socialist Soc'y., 260 F. 885, 891-92 (S.D.N.Y. 1919).

24. The Sedition Act of 1918 (Pub. L. 65–150, § 3, 40 Stat. 553 (1918) (amending and expanding Espionage Act of 1917).

25. David Asp & Deborah Fisher, *Espionage Act of 1917*, FIRST AM. ENCYCLOPEDIA (May 2019), [https://perma.cc/KQ2T-CBLC].

26. PAUL AVRICH, SACCO AND VANZETTI: THE ANARCHIST BACKGROUND 94 (1991).

27. Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

28. *Id.* at 625, 628 ("[N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate

Holmes[29] signaled an attempt to add teeth to the clear and present danger test, it failed to do so, leaving the law of sedition to await curtailment for another half-century.[30] In addition, Holmes may also have been disturbed by the widespread and branching use of the indictments under an interpretation he had hoped would narrow their application. His dissent did not stem the tide.[31]

The use of espionage and sedition laws did not have the same magnitude during World War II.[32] Instead, however, the government went further. President Franklin Roosevelt issued Executive Order No. 9066.[33] That order, issued after the United States was at war with Japan, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. . . ." It included the forced curfew of people of Japanese ancestry in some areas designated as West Coast military areas and created exclusion areas for other regions that were enforced using internment camps.

Despite the benign language, the Executive Order was carried out through the forced removal of all Japanese residents of California into internment camps.

> From the end of March to August, approximately 112,000 persons were sent to "assembly centers" – often racetracks or fairgrounds – where they waited and were tagged to

---

danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.").

29. *Id.* ("But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion.") (Holmes, J., dissenting).

30. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (a state could not forbid or proscribe advocacy of the use of force, except where such advocacy is directed toward producing imminent lawless action and is likely to incite or produce such action.).

31. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 585 (1951) ((Writing in dissent, Justice Douglas give voice to the frustrations of the failure to protect free speech under the clear and present danger test: "[U]pholding law prohibiting advocacy of violence because it involves such danger to the security to the republic that the State may outlaw it) The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed."); Whitney v. California, 274 U.S. 357 (1927).

32. *See* Philip A. Dynia, World War II, FIRST AM. ENCYCLOPEDIA (2009), [https://perma.cc/GA6Y-NJP4].

33. Authorizing the Secretary of War to Prescribe Military Areas, 7 Fed. Reg. 1407 (Feb. 25, 1942).

> indicate the location of a long-term "relocation center" that would be their home for the rest of the war. Nearly 70,000 of the evacuees were American citizens. There were no charges of disloyalty against any of these citizens, nor was there any vehicle by which they could appeal their loss of property and personal liberty.[34]

The constitutionality of the interments was questioned in *Korematsu v. United States*.[35] Like the Supreme Court at the time of the French Revolution and World War I, the Supreme Court again chose to ignore the actual conduct of the government to rule in its favor:

> It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.[36]

---

34. Japanese-American Internment During World War II, U.S. NAT'L ARCHIVES, https://www.archives.gov/education/lessons/japanese-relocation [https://perma.cc/DJ22-5KXE].

35. Korematsu v. United States, 323 U.S. 214 (1944).

36. *Id.* at 223.

Given this abject failure to recognize the constitutional rights of its citizens and residents, it should come as little surprise that Congress and the courts continued to ignore limitations imposed by the Constitution following World War II, particularly with regard to concerns over the communist threat espoused in *Abrams*.[37] In the 1950s, the government returned to the Wilson era practice of hunting down potential dissidents for their political views.

The concerns over Communist sympathizers that began with the Russian Revolution and the interplay of communism with the prosecution of World War I continued through World War II and into the emerging Cold War.[38] Beginning in 1938, the House Un-American Committee of the House of Representatives ("HUAC") began to focus on communist infiltration into American industries, including that of motion pictures.[39] The HUAC was joined by the Federal Bureau of Investigation ("FBI") in 1942, which initiated an investigation into "Communist Infiltration of the Motion Picture Industry."[40]

The HUAC had broad authority to investigate:

> (1) the extent, character, and objects of un-American propaganda activities in the United States,
>
> (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle

37. Abrams v. United States, 250 U.S. 616 (1919).

38. *See, e.g.*, Richard Crockatt, The Fifty Years War: The United States and the Soviet Union in World Politics, 1941-1991 30–31 (1995) ("The maximum communist programme is well illustrated in Lenin's uncompromising statement that 'as long as capitalism and Socialism remain, we cannot live in peace. In the end one or another will triumph."); JAMES SPARROW, WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT 109 (2011) (presidential contender Thomas E. Dewey "asserted, "the Communists are seizing control of the New Deal, through which they aim to control the Government of the United States").

39. Erica Bose, *Three Brave Men: An Examination of Three Attorneys Who Represented the Hollywood Nineteen in the House Un-American Activities Committee Hearings in 1947 and the Consequences They Faced*, 6 UCLA ENT. L. REV. 321, cmt. at 323 (1999) ("H.U.A.C. first appeared as a special committee in 1938. . . . [I]t spent much of its first six years trying to prove that Communists dominated such New Deal organizations as the Federal Theatre Project, the C.I.O., and the Tennessee Valley Authority.").

40. DANIEL J. LEAB, A GUIDE TO THE MICROFILM EDITION OF FEDERAL BUREAU OF INVESTIGATION, CONFIDENTIAL FILES, COMMUNIST ACTIVITY IN THE ENTERTAINMENT INDUSTRY, FBI SURVEILLANCE FILES ON HOLLYWOOD, 1942–1958 intro. at v–x (1991).

> of the form of government as guaranteed by our Constitution, and
>
> (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.[41]

The investigations were predominately focused on communist infiltrations and heavily influenced by J. Edgar Hoover's FBI investigations. Hollywood had been a HUAC target a number of times, but the focus grew with the FBI reports, culminating in particularly explosive hearings in 1947 and again in 1951–52.[42]

> [T]he FBI throughout much of the 1940s and 1950s "was selling its own brand of anti-Communism"—and one of its most important clients was HUAC, through which material from the bureau's confidential files became "public information" that could spread fears about radicalism "without compromising the FBI's image of a disinterested, nonpartisan, investigative agency."[43]

The 1947 investigation was triggered by FBI and HUAC investigations that identified Gerhart Eisler, a Hollywood composer, as a spy for the Communist International Party.[44] As a Hollywood composer, Eisler opened the door to more Hollywood investigations and accusations. The HUAC initially subpoenaed 41 individuals.[45] "Over the course of five days, a total of twenty-two witnesses eventually denounced over one-hundred men and women as members of the Hollywood branch of the Communist Party."[46] The threat of Communism—or the threat of federal regulation—motivated Louis B. Mayer, Walt Disney, Samuel Goldwyn, Harry Cohn, Barney Balaban, Albert Warner, Jack Warner, and other studio

---

41. H.R. Res. 282, 75th Cong., 83 CONG. REC. 7568 (1938); *see* Martin H. Redish & Christopher R. McFadden, *HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 MINN. L. REV. 1669, 1678 (2001).

42. LEAB, *supra* note 40, at vi. ("[T]he 1947 HUAC hearings dealing with the movies and obviously based on FBI information was called by the committee '[h]earings dealing with Communist infiltration of the movie industry.' Related hearings held in 1951-52 dealt with 'Communist infiltration of [the] Hollywood motion picture industry.'") (internal footnotes omitted).

43. *Id.*

44. ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA 359–415 (1998) ("By the end of the war, the FBI believed it had a big fish on the line. Eisler's apparently furtive behavior . . . gave plausibility to that characterization. . . ."). *See also* Redish & McFadden, *supra* note 41, at 1680.

45. Redish & McFadden, *supra* note 41, at 1681.

46. *Id.* (quoting ROBERT VAUGHN, ONLY VICTIMS 324 (1972)).

heads to promise an expungement of communists from the ranks of Hollywood.[47]

The HUAC also used its influence to control the staff of the FCC, helping to assure that the administrative agencies involved in radio and television—the federally regulated siblings of the motion picture industry—were under the same philosophical approach.[48]

"[T]he FCC played a pivotal role in the political and social crisis that enveloped the United States regarding the Red Scare."[49] "The battles between the FCC and Congress took their toll on the staff members and political will of the FCC, so that eventually, the individuals targeted withdrew from the agency and the political stance reversed itself, supporting a more politically conservative agenda sought by those involved with the fight."[50]

Even though the constitutional understanding of the First Amendment was beginning to undergo significant change in the 1960s with decisions on defamation[51] and incitement,[52] the regulation of broadcasting was still under administrative control.

The FCC initially invoked its normative standards in a "fairness" standard.[53] Later, concerned that the decades of anti-Communist intimidation were coming to an end, the FCC sought to further its normative agenda on speech regulation through administrative changes requiring broadcasters to provide a "right of reply"[54] to candidates for

---

47. VAUGHN, *supra* note 46, at 76–80.

48. *See* SUSAN L. BRINSON, THE RED SCARE, POLITICS, AND THE FEDERAL COMMUNICATIONS COMMISSION 1941–1960, 2–4 (2004) (describing the post-war Communist scare as largely motivated by a conservative backlash against the progressive social landscape of President Roosevelt's New Deal.).

49. *Id.* at 88.

50. Jon M. Garon, *Hidden Hands That Shaped the Marketplace of Ideas: Television's Early Transformation From Medium to Genre*, 19 U. DENVER SPORTS & ENT. L.J. 29, 63 (2016). *See also* BRINSON, *supra* note 48, at 88.

51. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

52. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (replacing clear and present danger test with imminent lawless action test allowing prohibition of speech "directed at inciting or producing imminent lawless action" only if it is "likely to incite or produce such action.").

53. In the Matter of Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). *See* Roscoe L. Barrow, The Fairness Doctrine: A Double Standard for Electronic and Print Media, 26 Hastings L.J. 659 (1975); Thomas J. Houser, *Fairness Doctrine--An Historical Perspective*, 47 NOTRE DAME L. REV. 550 (1972); Thomas G. Krattenmaker & L. A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151 (1985).

54. Communications Act, 47 U.S.C. § 315 (1959) (superseded) ("315. Candidates for public office; facilities; rules. (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates

political office. The effect of the right of reply requirement was to discourage the participation of the broadcasters in advocatorial politics.[55] These efforts were not new. Writing in 1975 about government interference with the press, Professor Roscoe Barrow noted—

> Governmental activities deemed repressive of the media have taken several forms. Then Vice President Spiro Agnew and other administration spokesmen attacked the media for bias. Newspersons were subjected to selective investigation by federal agencies, and federal suits were brought to require them to reveal their sources. Newspersons' telephones were tapped. A taped conversation between President Nixon and staff members disclosed a threat to encourage challenges to the Washington Post's applications for renewal of its radio and television station licenses because the Washington Post had a leading role in reporting the Watergate events. In the view of the media, the Office of Telecommunications Policy (OTP) was politicized and its director, recommended a "carrot and stick" approach to induce favorable comment by broadcasters on the Nixon administration's performance.[56]

The Supreme Court upheld these powers of a regulatory agency to regulate the broadcast industry. In *Red Lion Broadcasting Co. v. Federal Communications Commission*,[57] the Supreme Court upheld the administrative agencies' interpretations of the Federal Communication Act on the basis that they "enhance rather than abridge the freedoms of speech and press protected by the First Amendment."[58]

In much the same way the Supreme Court repeatedly failed to reign in the abuse of sedition and syndicalization laws, the Court also gave great deference to the FCC. In upholding the fairness doctrine and right of reply statutes to regulate broadcasters, the Court first reasserted that it had made

---

for that office in the use of such broadcasting station. . . . "). *See also* Applicability of the Fairness Doctrine in Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (July 25, 1964).

55. *See* Krattenmaker & Powe, *supra* note 53, at 152–53 ("The Fairness Doctrine thus stands as a symbol of what Americans hope for from the radio and television industry: neutral, detached presentation of significant public issues. Such reportage should inform without indoctrinating, producing an enlightened citizenry but avoiding manipulation of voters' values by an entrenched, uncontrollable oligopoly motivated solely by a desire to maximize its own profits.").

56. Barrow, *supra* note 53, at 660 n.7 (internal citations omitted).

57. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

58. *Id.* at 375.

the correct antitrust holding in *National Broadcasting Co. v. United States*,[59] which forced CBS to divest itself of half of its radio stations to promote competition in keeping with the FCC's mandate to license in the public interest.[60] The denial of a station license, the Supreme Court explains, "is not a denial of free speech" when ordered "in the public interest."[61]

The Court cited to a long history of regulating broadcasters as consistent with the First Amendment[62] and pointed to the divergent regulatory models between those of the printed press and those of the broadcasters:

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.[63]

Finally, the Court dismissed speculation that the regulations chilled speech[64] or were becoming anachronistic due to the development of technological innovations that would overcome scarcity.[65] As with its many opportunities to protect speech rather than the governmental interest, the Supreme Court chose to protect the regulators. To this date, while *Red Lion* has been the subject of much criticism, it has yet to be overruled by the Supreme Court.[66]

---

59. *Id.* at 388–89.

60. *Id.* at 389 (quoting NBC v. United States, 319 U.S. 190, 227 (1943)).

61. *Id.*

62. *Id.* at 394 ("[T]he Commission for 40 years has been choosing licensees based in part on their program proposals.").

63. *Id.* at 390.

64. *Id.* at 392–93 ("[B]roadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective. . . . At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative.").

65. *Id.*

66. *See* Turner Broad. Sys., Inc. v. FCC (Turner I), 512 U.S. 622, 638–39 (1994) ("Although courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence, and see no reason to do so here. . . . [C]able television does not suffer from the inherent limitations that characterize the broadcast medium.") (internal citation omitted); CBS v. FCC, 453 U.S. 367, 396

Although the history of incursions on free speech focuses on the Supreme Court's jurisprudence in the application of various executive orders, regulatory procedures, and legislative acts, there is an important aspect of the administrative agency's ability to impact First Amendment rights without resort to the courts.[67] The FCC, for example, continues to enforce regulations on cross-ownership of broadcasting and in children's advertising.[68] By 1990, Congress recognized that the social norms driving children's programming were eroding as more affluent homes shifted to cable for their children's content. The shift left those reliant on free broadcasting without appropriate programming for their families. By 1990, for example, the average amount of hours of children's television had dropped to only two hours produced each week, compared with eleven hours produced a decade earlier.[69] Congress enacted legislation and called upon the FCC for appropriate implementing regulations.[70]

These regulations provided an important public service, particularly given the growing disparity between those citizens who can afford their news, education, and entertainment content.[71] At the same time, however, these were content-based restrictions negotiated with the companies being regulated by the regulator. As such, the process and the outcome of the regulations fell well below the Supreme Court's standards for upholding such regulations.

It remains an open question of whether children's content requirements are content-based or content-neutral regulations. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." Favoring children's content over other forms of news and entertainment is certainly a form of content preference, even if it is merely a categorical one.[72] In

---

(1981) (upholding broadcasters obligations to provide time for national political candidates); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (upholding *Red Lion*, 395 U.S. 367 (1969) while refusing to extend it to print media).

67. *See* Cecilia Kang, F.C.C. Opens Door to Increased Consolidation in TV Industry, N.Y. Times, Nov. 17, 2017, at B2; *FCC Broadcast Ownership Rules*, FED. COMMC'N COMM'N, https://www.fcc.gov/consumers/guides/fccs-review-broadcast-ownership-rules (last visited Nov. 22, 2019).

68. *See* Children's Television Act of 1990, Pub. L. No. 101–437, 104 Stat. 996–1000 (codified as amended at 47 U.S.C. §§ 303a, 303b, 394 (2010)).

69. S. REP. NO. 101–66, at 3 (1989). *See* Joel Timmer, *Changes in the Children's Television Marketplace, the Children's Television Act, and the First Amendment*, 37 CARDOZO ARTS & ENT. L.J. 731, 736 (2019).

70. *In re* Policies and Rules Concerning Children's Television Programming, 11 FCC Rcd. 10660, ¶ 5 (1996).

71. Jon M. Garon, *Dysregulating the Media: Digital Redlining, Privacy Erosion, and the Unintentional Deregulation of American Media*, 73 ME. L. REV. 45 (2021).

72. Regan v. Time, Inc., 468 U.S. 641, 648–49 (1984).

addition, "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."[73] The children's broadcasting rules both impose direct costs on the broadcasters and limit the amount of commercial time that may be sold during children's broadcast, creating just such a financial burden on the broadcaster's speech. If the restrictions are deemed to be content-based regulations, then the appropriate legal standard is one of strict scrutiny. When asked whether the children's broadcast regulation "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end," it is quite unlikely the regulation could meet the strict scrutiny test.[74] The government is free to provide children's programs and support public broadcasting and many other initiatives to this end. Compelling speech would be very unlikely to meet this exacting standard.

Nonetheless, given the overall amount of broadcast content, the requirement to set aside a small percentage for children's programming can arguably be considered analogous to the requirement that cable systems set aside a small portion of their bandwidth for low power stations or local programs.[75] The Supreme Court has explained that "under the intermediate level of scrutiny applicable to content-neutral regulations, [a regulation] would be sustained if it were shown to further an important or substantial governmental interest unrelated to the suppression of free speech, provided the incidental restrictions did not 'burden substantially more speech than is necessary to further' those interests."[76]

In *Turner Broadcasting System, Inc. v. Federal Communications Commission*, the Supreme Court found that "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems' is an important federal interest."[77] The concern over the loss of broadcast access would likely extend to the composition of the broadcast content as well as broadcasters themselves. Admittedly, this argument is somewhat undermined by the costs posted on broadcasters for children's television content, given that Congress was concerned with "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized."[78] Assuming Congress balanced the costs and savings of the Cable Act to achieve its compelling interests to promote broadcasting in the

---

73. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991).

74. *Id.* at 118; Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

75. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 186 (1997) (*Turner II*).

76. *Id.*

77. Turner Broad. Sys., Inc. v. FCC (Turner I), 512 U.S. 622, 647 (1994) (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984)).

78. Turner II, 520 U.S. at 191 (quoting Cable Act § 2(a)(16)).

public interest, then the intermediate scrutiny test may afford sufficient discretion to allow Congress the power to balance these competing goals. Nonetheless, the same arguments made to support the must-carry rules in *Turner* seem to undermine the congressional mandates in the children's programming arena.

Beyond the FCC, other administrative agencies also use their administrative powers to impact First Amendment rights. This can be seen in the implementation of the CARES Act.[79] The CARES Act is the federal funding program providing financial relief from the COVID-19 pandemic.[80] Under the CARES Act, PPP loans are available to any business which met the qualification of fewer than 500 employees or another employment ceiling established by the Small Business Administration (SBA).[81] In the months following the roll-out of the emergency relief, the broader policies of the SBA's lending ineligible rules have also raised free speech concerns.[82]

For both the CARES Act loans and the other lending programs funded by Congress, the SBA has promulgated a list of businesses that it deems ineligible for financial support. These include government-owned entities, businesses engaged in any illegal activity, pyramid sales, nonprofit organizations, and many other categories.[83] Although the SBA was formed in 1960, it was not until 1996 that the agency developed a list of ineligible

---

79. The Coronavirus Aid, Relief, and Economic Security (CARES) Act, PUB. L. NO.: 116-136 (2020).

80. CARES Act codified Section 7(a) of the Small Business Act (15 U.S.C. § 636(a)).

81. 15 U.S.C. § 636(a)(36)(D)(i)(I-II). The specific language provides:

> During the covered period, in addition to small business concerns, any business concern, nonprofit organization, veterans organization, or Tribal business concern described in section 657a(b)(2)(C) of this title shall be eligible to receive a [PPP] loan if the business concern, nonprofit organization, veterans organization, or Tribal business concern employs not more than the greater of-
>
> (I) 500 employees; or
>
> (II) if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern, nonprofit organization, veterans organization, or Tribal business concern operates.

82. *See, e.g.*, Pharaohs GC, Inc. v. U.S. Small Bus. Admin., No. 20-CV-665, 2020 WL 3489404, at *1 (W.D.N.Y. June 26, 2020); Diocese of Rochester v. U.S. Small Bus. Admin., No. 6:20-cv-06243-EAW, 2020 WL 3071603, at *2 (W.D.N.Y. June 10, 2020); Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin., No. 20-C-0601, 2020 WL 2088637, at *2 (E.D. Wis. May 1, 2020)).

83. § 120.110 What businesses are ineligible for SBA business loans?, 13 C.F.R. § 120.110 (Sept. 20, 2017).

businesses.[84] The list is quite varied and the rationale for the inclusion on the list may include obvious concerns such as the use of government support for illegal purposes at one extreme, to the efficacy of government investments in life insurance at the other end of the list.

In addition to the concerns regarding the use of the PPP funds, the SBA also singles out two fields based on the content of the message at the heart of their business:

> (k) Businesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting;
>
> . . .
>
> (p) Businesses which:
>
> (1) Present live performances of a prurient sexual nature; or
>
> (2) Derive directly or indirectly more than de minimis gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature;. . .[85]

The propriety of the SBA ineligibility rules must be assessed both under the Administrative Procedures Act (APA) to assure that the agency has operated within the bounds of its authority, as well as an independent First Amendment review to assure that Congress operated within its limits when granting the authority. If the regulation does not meet the APA standard, then there is no need to look beyond it for constitutional infirmity.

The APA prohibits agencies from taking action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[86] The review under the APA is a two-step analysis provided in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[87] "[C]ourts must

84. DV Diamond Club of Flint, LLC v. U.S. Small Bus. Admin., No. 20-CV-10899, 2020 WL 2315880, at *2 (E.D. Mich. May 11, 2020) ("On January 31, 1996, the SBA first declared certain types of businesses ineligible to participate in SBA lending programs (the 'Original SBA Ineligibility Rule').").

85. *Id*.

86. Administrative Procedure Act, 5 U.S.C. § 706(2)(C) (2020).

87. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear,

determine whether the statute is ambiguous, applying the ordinary tools of statutory construction. If the statute is unambiguous, then the court applies it as-written; that is the end of the matter."[88] "If the statute is ambiguous on the point, we defer at step two to the agency's interpretation so long as the construction is a reasonable policy choice for the agency to make."[89] Only when the legislation is silent or ambiguous does the court go further under the Chevron Doctrine. In the second stage, the court should "defer to the agency's construction if it is 'permissible'—i.e., 'within the bounds of reasonable interpretation.'"[90]

The application of the Chevron Doctrine is particularly interesting here because there seems to be no reported litigation challenging the SBA Ineligibility Rule until it was extended by the application of the CARES Act regarding participation in the PPP loan program.

The underlying authority does not speak to eligibility requirements based on speech, sexual activities, or religious advocacy. Congress has provided the SBA with a comprehensive set of regulations involving its loan program.[91] These powers, however, do not extend to the prohibition or

---

> that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc, 467 U.S. 837, 842-43 (1984); *see also* Owensboro Health, Inc. v. U.S. HHS, 832 F.3d 615 (6th Cir. 2016). (Chevron two step analysis used to uphold HHS interpretation of Medicaid).

88. Arangure v. Whitaker, 911 F.3d 333, 337-38 (6th Cir. 2018) (internal quotation marks and citation omitted).

89. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) (internal quotation marks and citation omitted).

90. *Arangure*, 911 F.3d at 338 (internal quotation marks and citation omitted).

91. (a) Loans to small business concerns; allowable purposes; qualified business; restrictions and limitations

> The Administration is empowered to the extent and in such amounts as provided in advance in appropriation Acts to make loans for plant acquisition, construction, conversion, or expansion, including the acquisition of land, material, supplies, equipment, and working capital, and to make loans to any qualified small business concern, including those owned by qualified Indian tribes, for purposes of this chapter. Such financings may be made either directly or in cooperation with

regulation of either sexually prurient content or the regulation of religiously oriented content. While it would not be surprising for Congress to limit access to the adult entertainment industry,[92] it would be quite another thing for Congress to disenfranchise for-profit businesses because of their religious activities.[93] Some courts have found that the limitation on the PPP loans was inconsistent with the broad authority granted by Congress to provide PPP loans to "any business" with 500 or fewer employees,[94] while others found the limitations consistent with the contextual understanding of the congressional purpose.[95] In all cases, the courts accept that the SBA limitations were not inconsistent with the statutory language of the SBA Act prior to its amendment. By recognizing that Congress could have extended the funding of the PPP loans to companies previously ineligible, all the courts reviewing the question have acknowledged that the regulations meet the *Chevron* analysis.[96]

Nonetheless, there still remains the question of whether the provisions limiting certain types of business would withstand a First Amendment analysis. Unlike regulations to prohibit speech, regulations to condition a public benefit on some aspects of speech are within the power of Congress. "[I]t is well established that the government can make content-based distinctions when it subsidizes speech."[97] The government is free to choose who to support with its own funds. At the same time, however, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."[98]

Treating these funds as subsidies that the government is free to provide or to withhold, courts have found the PPP loan allocations are not

---

> banks or other financial institutions through agreements to participate on an immediate or deferred (guaranteed) basis. . . .

*See* 15 U.S.C.A. § 636 (West).

92. *See* Am. Civil Liberties Union v. Ashcroft, 542 U.S. 656 (2004); Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564 (2002); Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997).

93. *See, e.g.*, Religious Freedom Restoration Act of 1993. PUB. L. NO. 103–141 (1993) (prohibiting any agency from substantially burdening a person's exercise of religion).

94. *See* DV Diamond Club of Flint, LLC v. U.S. Small Bus. Admin., 439 F.Supp.3d 943, 2020 WL 2315880 (E.D. Mich. 2020).

95. *See* Pharaohs GC, Inc. v. U.S. Small Bus. Admin., No. 20-CV-665, 2020 WL 3489404, at *7 (W.D.N.Y. June 26, 2020).

96. *See* DV Diamond Club of Flint, LLC v. Small Bus. Administration, 960 F.3d 743, 746 (6th Cir. 2020) (upholding the right of the adult business to seek PPP funding as provided by the amendment. The court noted that "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

97. Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 188–89 (2007).

98. Perry v. Sindermann, 408 U.S. 593, 597 (1972).

inconsistent with the First Amendment.[99] A review of the SBA funding priorities, however, suggests the SBA is making loan eligibility based on particular forms of speech the government does not want to support in addition to considerations about the credit-worthiness and likelihood of loan repayment. For example, if three video game producers with identical staffing and financial histories all applied for a loan, the company producing highly violent and graphical games would be eligible for the loan while the company producing games with sexual depictions of a "prurient sexual nature" would be barred, as would the videogame company producing games "teaching" comparative "religious beliefs" to be sold to private and public schools.

The Supreme Court has recently undertaken an interpretation of similar regulations. In *Matal v. Tam*,[100] the Supreme Court addressed the Lanham Act's bar on the registration of disparaging trademarks. Two terms later, in *Iancu v. Brunetti*,[101] the Supreme Court addressed the trademark registration "applying to marks that "[c]onsist[ ] of or comprise[ ] immoral[ ] or scandalous matter."[102]

Trademark registration is not a prerequisite to trademark rights in the United States. For most business owners, the SBA loans are far more fundamental to their success and failure than the federal trademark registration. But like the SBA loans, they provide a significant benefit to the recipients. The court in *Pharaoh* acknowledged that "[e]ven if PPP loans are subsidies, however, that does not end the inquiry. The government may not make funding choices that are "the product of invidious viewpoint discrimination. . . ."[103]

While the *Pharaoh* court used the right rule, it did not frame the correct question. It noted that "if the SBA had chosen to exclude only adult-entertainment businesses from the PPP, Pharaohs would have a stronger argument that Congress was "invidious[ly]" seeking to "suppress[ ]" its type of speech." Instead, the SBA, with congressional acquiescence, is doing precisely what the PTO had been doing in its trademark registrations, namely making its own determinations regarding when a particular business was operating as an adult entertainment company, a lobbying agency, a

---

99. Am. Ass'n of Political Consultants v. U.S. Small Bus. Admin., 2020 WL 3406524, at *1 (D.C. Cir. May 26, 2020) (finding "that PPP loans are akin to the subsidy at issue in Regan, particularly in light of the PPP's forgiveness provisions."); Pharaohs GC, Inc. v. U.S. Small Bus. Admin., No. 20-CV-665, 2020 WL 3489404, at *7 (W.D.N.Y. June 26, 2020) (same).

100. Matal v. Tam, 137 S. Ct. 1744 (2017).

101. Iancu v. Brunetti, 139 S. Ct. 2294, 2297 (2019).

102. *Id.* at 2298 (quoting Lanham Act § 1052(a)) (brackets in original).

103. Pharaohs GC, Inc. v. U.S. Small Bus. Admin., No. 20-CV-665, 2020 WL 3489404, at *7 (W.D.N.Y. June 26, 2020) (quoting Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998).

religious teacher, or when these business offering their protected speech were not sufficiently objectionable to disqualify the business for a loan.

In *Iancu v. Brunetti*, "[t]he Justices thus found common ground in a core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys."[104] The categories of excluded speech are not focused on specific businesses or the economic harms those businesses convey. It is particularly difficult to see the social harm of religious teaching, but irrespective of one's view on that subject, the Bill of Rights has resolved that question on the side of protecting the religious speech.

The decisions in *Matal v. Tam*[105] and *Iancu v. Brunetti*[106] in the sphere of trademark regulation should also be understood to have their consequence for similarly arbitrary decision-making among other regulatory agencies, even those as innocuous as the SBA. The choice to exclude certain businesses or people based solely on their message will require the regulations to meet constitutional scrutiny rather than merely the *Chevron* test.

The role of content and viewpoint discrimination cuts across other areas of the law as well. For example, Christopher Roederer[107] and Alexander Tsesis[108] both raise concerns regarding the speech codes used on public university campuses. These authors point out that the efforts by the Department of Education, which began in 2010 with its Title IX Dear Colleague letter[109] tended to conflate offensive speech with violations of Title IX.[110] The guidance offered in the rescinded Dear Colleague letter

---

104. *Iancu*, 139 S. Ct. at 2299 (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995)) (explaining that viewpoint discrimination is an "egregious form of content discrimination" and is "presumptively unconstitutional").

105. Matal v. Tam, 137 S. Ct. 1744 (2017).

106. Iancu v. Brunetti, 139 S. Ct. 2294 (2019).

107. Christopher J. Roederer, *Free Speech on the Law School Campus: Is It the Hammer or the Wrecking Ball That Speaks?*, 15 U. ST. THOMAS L.J. 26, 34 (2018). *See also* Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995) (for a review of these concerns prior to the 2011 action).

108. Alexander Tsesis, *Campus Speech and Harassment*, 101 MINN. L. REV. 1863 (2017).

109. Office for Civil Rights, Dear Colleague Letter from Assistant Secretary for Civil Rights, U.S. DEP'T EDUC. (Oct. 26, 2010), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf; *see* Tsesis, *supra* note 108, at 1998-99.

110. The statutes that OCR enforces include . . . Title IX of the Education Amendments of 19722 (Title IX), which prohibits discrimination on the basis of sex; Section 504 of the Rehabilitation Act of 19733 (Section 504). . . . School districts may violate these civil rights statutes and the Department's

went well beyond the policies of *Davis v. Monroe County Board of Education*.[111] In dealing with the extension of Title IX liability to a school district, the *Davis* Court explained that it did have a responsibility for student-on-student sexual harassment.[112] At the same time, however, the Court made clear that this was not an expectation to stop any speech that might be deemed offensive. To be actionable, "a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[113] Where such conduct occurs, the First Amendment concerns no longer limit the government's right to punish the offending conduct.

The Dear Colleague letter omitted such advice. While the effort to improve the vigor and effectiveness of campus responses to sexual predation was long overdue, the guidance had the effect of circumventing the APA, eliminating any need to hold the guidance up for public comment, and relying on non-judicial settlements to restrict speakers' speech rights.

As the dissent in *Davis* points out, the First Amendment must be respected when public universities create speech codes and sexual harassment policies.[114] "A university's power to discipline its students for speech that may constitute sexual harassment, however, remains

---

> implementing regulations when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees. . . . And, of course, even when bullying or harassment is not a civil rights violation, schools should still seek to prevent it in order to protect students from the physical and emotional harms that it may cause.

Office for Civil Rights, Dear Colleague Letter from Assistant Secretary for Civil Rights, U.S. DEP'T EDUC. (Oct. 26, 2010), http://www2.ed.gov /about/offices/list/ocr/letters/colleague-201010.pdf. The concern is that the if the speech is not a civil rights violation, it may well be protected speech. The letter ignores these countervailing considerations.

111. Davis ex rel. LaShonda D. v. Monroe City Bd. of Educ., 526 U.S. 629, 651 (1999).

112. *Id.*

113. *Id.*

114. *Id.* at 667 (Kennedy, J. dissenting); *see, e.g.*, Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995) (policy stuck down for vagueness and overbreadth); UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys., 774 F.Supp. 1163 (E.D.Wis.1991) (same); Doe v. Univ. of Mich., 721 F.Supp. 852 (E.D.Mich.1989) (same); IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993) (sanctions for "ugly woman contest" with "racist and sexist" overtones impermissible under the First Amendment).

circumscribed by the First Amendment."[115] The efforts to use administrative policies and non-legislative solutions to resolve the tension between free speech and communal standards simply cannot be implemented by ignoring judicial oversight or the competing First Amendment rights of all members of the campus community.

## II. THE TRANSFORMATION FROM BROADCASTING TO SHARED AND SOCIAL MEDIA

The challenge of regulating speech has changed dramatically in the twenty-first century because the nature of speech has changed as well. Those living through the twentieth century experienced a transformative experience as the mechanical player piano gave way to the phonograph[116] and the telegraph transformed into first radio,[117] and then television.[118] To provide perspective, it took 38 years for radio to reach an audience of 50 million people but it took television only 13 years.[119] The Internet required only four years.[120]

"Media industries have customarily been defined in terms of a distinct product distributed in a particular way—books, magazines, television, radio, music, film, and video, for instance. In the new digital economy, the content provided by many of these formerly distinct

---

115. *Id.* at 667.

116. *See* KYLE BARNETT, RECORD CULTURES: THE TRANSFORMATION OF THE U.S. RECORDING INDUSTRY 21 (2020); JONATHAN STERNE, THE AUDIBLE PAST: CULTURAL ORIGINS OF SOUND REPRODUCTION 179 (2003); *History of Phonograph – First Phonograph*, SOUND RECORDING HISTORY, http://www.soundrecording history.net/history-of-sound-recording/phonograph-history/ (last visited Apr. 8, 2020); *see also* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908) (discussing the dominance of the player piano roll and its lack of copyright protection).

117. *See* BRIAN WINSTON MEDIA TECHNOLOGY AND SOCIETY: A HISTORY: FROM THE TELEGRAPH TO THE INTERNET 74 (1998).

118. *See* GARY EDGERTON, THE COLUMBIA HISTORY OF AMERICAN TELEVISION 125 (2009) ("The commercial realization of television in the late 1940s and early 1950s was even more lightning fast and momentous than that of radio during the mid 1920s."); *see also* U.S. FED. COMMC'NS COMM'N, No. 5060, REPORT ON CHAIN BROADCASTING 197 (1941) (hereinafter CHAIN BROADCASTING REPORT) ("The Commission found that at the end of 1938 there were 660 commercial stations in the United States, and that 341 of these were affiliated with national networks.").

119. *50 Million Users: How Long Does It Take Tech To Reach This Milestone*, INTERACTIVE SCHS., (Feb. 8, 2018), https://blog.interactiveschools.com/blog/50-million-users-how-long-does-it-take-tech-to-reach-this-milestone (last visited Sept. 21, 2020) (by comparison "[i]t took Facebook just two years to hit the 50 million mark. . . . YouTube and Twitter were even faster, 10 months and nine months respectively.").

120. *Id.*

industries can be distributed via the Internet. . . ."[121] Communications theorists often turn to the visionary comments of Marshall McLuhan, who recognized the transformation being wrought by the "electronic age."[122] For McLuhan, the revolution was the advent of television and the electronic village that it created to transform a populace into a common people, who shared a unifying history and mythology. The 1969 launch of *Sesame Street*, for example, transformed the understanding of early education and prominently embraced integration and diversity, normalizing a world that was rarely to be seen on the actual streets of America.[123] *Gunsmoke* and the Western genre created the American mythology;[124] *All in the Family* captured and normalized the post-60s world of modern liberalism;[125] *Modern Family* broke taboos on homosexuality, helping promote the end to sex-based marital discrimination;[126] *The West Wing*, educated (or

121. COLIN HOSKINS, STUART MCFADYEN, ADAM FINN, MEDIA ECONOMICS: APPLYING ECONOMICS TO NEW AND TRADITIONAL MEDIA 1 (2004).

122. *See* MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 152 (1994 ed.). *See generally* MARSHALL MCLUHAN, THE GUTENBERG GALAXY (1962); MARSHALL MCLUHAN & QUENTIN FIORE, THE MEDIUM IS THE MASSAGE: AN INVENTORY OF EFFECTS (1967). *See also* Jon M. Garon, *Mortgaging the Meme: Financing and Managing Disruptive Innovation*, 10 NW. J. TECH. & INTELL. PROP. 441 (2012).

123. *See* Lise Guernsey, *How Sesame Street Changed the World*, Newsweek, May 22, 2009, https://www.newsweek.com/how-sesame-street-changed-world-80067 (last visited Sept. 2021) ("Sesame Street is no ordinary nonprofit. It is, arguably, the most important children's program in the history of television. No show has affected the way we think about education, parenting, childhood development and cultural diversity, both in the United States and abroad, more than Big Bird and friends.").

124. *See* Alfred Siewers, *What I Learned About American Culture By Binging On 'Gunsmoke' And 'House Of Cards,*' FEDERALIST, June 22, 2017, https://thefederalist.com/2017/06/22/what-i-learned-about-american-culture-by-binging-on-gunsmoke-and-house-of-cards/ (last visited Sept. 2021) ("'Gunsmoke' on CBS claims to be the world's longest-running prime-time TV drama series with the same star and setting, from 1955 to 1975. One TV critic memorialized its Western mythology as 'the Iliad and the Odyssey' of America.").

125. *See* Sascha Cohen, *How Archie Bunker Forever Changed in the American Sitcom*, SMITHSONIAN, Mar. 21, 2018, https://www.smithsonianmag.com/arts-culture/history-working-class-families-american-sitcom-180968555/ (last visited Sept. 21, 2021) ("'All in the Family' was a groundbreaking commercial success, ranking number one in the Neilsen ratings for five years. By 1975, one-fifth of the entire country was tuning in. . . . 'All in the Family' opened the floodgates for more representations of the working poor in 1970s situation comedies.").

126. *See* Spencer Kornhaber, *The Modern Family Effect: Pop Culture's Role in the Gay-Marriage Revolution, Atlantic*, June 26, 2015, https://www.theatlantic.com/entertainment/archive/2015/06/gay-marriage-legalized-modern-family-pop-culture/397013/ (last visited Sept. 21, 2021) ("It's impossible to know how much entertainment ever drives society rather than merely reflecting it. But it's hard to

miseducated) the public on the inner life of American politics;[127] and *Fox News* redefined and promoted the political conservative movement.[128]

These programs shaped hundreds of millions of individuals' views and educated generations of viewers. "Television was the central element in the media-based public sphere in the last half of the twentieth century. It gathered by far the largest audience . . . Television was the key link between society's public life and the private lives of citizens."[129] The norm—the status quo—was televised.[130]

This, however, was not the only revolution. The rest of the world had a slightly different experience. Outside the United States, the role of the ubiquitous television broadcast was not merely the media industry's effort to entertain and sell advertising. The traditional power over broadcasting held by many governments outside the United States requires a very different understanding of the relationship between speech and the government.[131] "In Western Europe, . . . the state is understood as television's most important guardian and financier, with television a strong means for the state to reach entire populations."[132]

The role of the media within each state is shaped by the politics and culture of that country, and in turn, helps to define the politics and

---

avoid the feeling that the past five or six years have seen a virtuous cultural cycle. 2009 was the year that audiences met Cam and Mitch, a gay couple living together with an adopted daughter.").

127. *See* Lynn Spigel, *Entertainment Wars: Television Culture after 9/11*, 56 AM. Q. 2 (June 2004); Yair Rosenberg, *Why 'The West Wing' Is a Terrible Guide to American Democracy*, ATLANTIC, Oct. 1, 2012 ("European Union Foreign Minister Catherine Ashton told Newsweek in 2010 that she learned about America and 'the mechanics of Washington life' from being 'an avid viewer of The West Wing.'").

128. *See* DAVID BROCK & ARI RABIN-HAVT, THE FOX EFFECT: HOW ROGER AILES TURNED A NETWORK INTO A PROPAGANDA MACHINE 11 (2012) ("the tail end of the 2008 election only marked the beginning of a larger transition at the network, one that would see Fox News change from a network that provided a conservative outlook on the news to an active and unapologetic mouthpiece for the Republican Party.").

129. JOSTEIN GRIPSRUD, RELOCATING TELEVISION: TELEVISION IN THE DIGITAL CONTEXT 3 (2010).

130. *Cf.* Gil Scott-Heron, *The Revolution Will Not Be Televised*, RCA/FLYING DUTCHMAN LABEL (1971) (illustrating the tension between the majority culture captured on television and the "revolutionary" culture reflected in the African-American experience that was substantially excluded from popular media).

131. *See* Alexander Dhoest, *The persistence of national TV: Language and cultural proximity in Flemish fiction*, in AFTER THE BREAK: TELEVISION THEORY TODAY 51 (Valck, Marijke de, and Jan Teurlings, ed., 2013).

132. *Id.* ("From its start, European television was organized and regulated on the level of nation states, who sought to control the new medium, which they deemed important to support – but also to form – the nation as 'one people'").

culture.[133] Such an approach is often framed by reference to competing conceptions of a public sphere and the competing models of self-governance such concepts engendered.[134] Such a dialectic is beyond the scope of this article. Nonetheless, a critical point remains that "democracy is more than the state, or a state with progressive social policies. But democracy *needs* the state as well as the public sphere of civil society. . . ."[135] For Jürgen Habermas, the public sphere began in the coffee houses, voluntary associations, literary societies, and independent press. In the modern age, the phonograph, radio, movie palace, and television network undertook these same attributes.

Where the television network answered to the political machine, however, it provided less opportunity for the public to direct its communal voice and more opportunity for the state to impose its will. Few nations outside the United States willingly chose to abstain from having an official government broadcasting service. And even in the United States, the FCC maintained sufficient control over the broadcasters through the license renewal process to assure that no broadcaster strayed too far from the consensus agenda of the government.[136]

---

133. *See* Georgina Born, *Digitising Democracy*, POL. Q., 102, 106 (2006) ("scholars . . . tend to divide between those who emphasise the democratic benefits of media that afford a universal public address and those who advocate media systems that enable a pluralistic address among multiple, competing publics, or 'counter-publics.'").

134. *See* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 31 (1991); see also Mark Rose, The Public Sphere and the Emergence of Copyright: Areopagitica, the Stationers' Company, and the Statute of Anne, 12 Tul. J. Tech. & Intell. Prop. 123, 124 (2009) ("In this influential study, Habermas describes the historical appearance of a new and distinctive social space which he refers to as the 'bourgeois public sphere.'"). *See generally* Jürgen Habermas, *Further Reflections on the Public Sphere*, in HABERMAS AND THE PUBLIC SPHERE (Craig Calhoun. Ed. (1992); PAUL RUTHERFORD, ENDLESS PROPAGANDA: THE ADVERTISING OF PUBLIC GOODS (2000).

135. David Abraham, *Persistent Facts and Compelling Norms: Liberal Capitalism, Democratic Socialism, and the Law*, 28 L. & SOC'Y REV. 939, 942, 944 (1994) ("Habermas and the left were not then primarily concerned with pluralism. . . . Rather, the demand . . . was to lift or remove the social and communication distortions generated by the various social inequalities that the Keynesian welfare state had, in its mediation of capitalism and democracy, rationalized but not eliminated.").

136. *See* Hyman H. Goldin, *Spare the Golden Goose" — The Aftermath of WHDH in FCC License Renewal Policy*, 83 HARV. L. REV. 1014, 1021–22 (1970) ("When the delinquency or program deficiency is exceptional, the Commission places the offending licensee on probation by granting a license for only one year. The Commission's tolerance sometimes extends beyond one probationary term."); Lili Levi, *Not with A Bang but A Whimper: Broadcast License Renewal and the Telecommunications Act of 1996*, 29 CONN. L. REV. 243, 247 (1996) ("In

With the dawn of the Internet, however, the grip of television and mass media is eroding into atomized media, socialized into the hands of every person holding a mobile phone or in reach of a computer. Where television in the United States was once controlled by a few national networks and in other nations often dominated by a single, government-funded enterprise, the modern media landscape has become highly fractured and atomized.[137] "Undeniably, the era of broadcast television as the prime mass medium is crumbling, making way for a more complex broadcasting landscape where diverse (niche, global, digital, interactive) channels divide the market, competing with other devices, media and cross-media applications."[138]

The change in the medium has fundamentally reshaped the nature of the message.

> Traditional media such as television, radio, or printed media have a one-dimensional character; they only work in one direction from the sender to the receiver without possibilities for mutual interaction. The interactivity of the Internet can extenuate the elitist character of traditional media; there is a shift from one-to-many to many-to-many and all-to-all communication. The technological networking of the world puts forward a new principle: all-embracing, participative, networked cooperation and grassroots direct democracy in all realms of society. It is up to human beings to change society in such a way that it can make full use of and realize the opportunities the Internet poses.[139]

This is not to suggest that radio or television have disappeared from the media landscape. Radio has the highest audience penetration among the various media, with monthly adult listening ranging in the 98–99%

---

eliminating even the aspirational norm of a full-fledged comparison of competing applicants at the renewal stage, it abandons what was long articulated as a philosophical premise of the 1934 Communications Act: the FCC's role in selecting the applicant 'best' advancing the public interest, convenience, and necessity."); J. Gregory Sidak, *An Economic Theory of Censorship*, 11 SUP. CT. ECON. REV. 81 (2004) ("Broadcast regulation can exploit sunk costs as a means of exerting control over the content of broadcast speech—to compel favored speech and to suppress disfavored speech.").

137. *See* Alexander Dhoest, *The persistence of national TV: Language and cultural proximity in Flemish fiction*, in AFTER THE BREAK: TELEVISION THEORY TODAY 51 (Valck, Marijke de, and Jan Teurlings, Ed.) (2013).

138. *Id.*

139. CHRISTIAN FUCHS, INTERNET AND SOCIETY: SOCIAL THEORY IN THE INFORMATION AGE 240 (2008).

levels.[140] At the same time, however, audiences are shifting in how they access their radio and listening services. For example, podcasts have grown into a considerable medium as well, with "62 million U.S. listeners a week, a 22% audience penetration."[141] The national television networks continue to exist, but they are now in competition with a multitude of competitors, many of which are creating original programming and even offering live sports.[142]

## III. NARROW TAILORING AND REGULATORY FAILURE

Traditional media now fits within a much larger array of media options. The shift from the one-to-many to the all-to-all paradigm has radically restructured the understanding of the digital media's role in the public sphere[143] as well as the regulatory role for the allocation of scarce spectrum.[144]

---

140. *The Steady Reach of Radio: Winning Consumer Attention*, NIELSEN, June 17, 2019, https://www.nielsen.com/us/en/insights/article/2019/the-steady-reach-of-radio-winning-consumers-attention/ (last visited Sept. 21, 2020) ([A]dults 18-49 are the demographic that tunes in the most. The monthly reach for these listeners is 132.4 million (98% of the population). . . . Adults 25-54 are the second most reached demographic for radio, with 123.6 million (99%) of the population listening each month.").

141. Robert Williams, *Podcast ads will double share of audio market by 2022, study forecasts*, MOBILE MARKETER, https://www.mobilemarketer.com/news/podcast-ads-will-double-share-of-audio-market-by-2022-study-forecasts/553505/#:~:text=Podcasts%20reach%2062%20million%20U.S.,over%20the%20next%20few%20years (last visited Sept. 21, 2020).

142. *See* Marc Berman, *OTT: Is It Really a War or Competition?*, TV TECHNOLOGY, Apr. 20, 2020, https://www.tvtechnology.com/news/ott-is-it-really-a-war-or-competition (last visited Sept. 21, 2020) (noting more than 1200 "Over-the-Top" Internet-enabled services. ""Linear is still the place to go for live programming and for sports, and that is not going to change," said [Dan Rayburn, principal analyst, Frost & Sullivan.]. "Major sports are still going to stay on traditional TV distribution because those are the platforms that have the money to pay for it."); Jacob Feldman, *As the Digital Rights Battle Continues, Has a Sports Streaming Leader Emerged?*, SPORTS ILLUSTRATED, Aug. 2, 2019, https://www.si.com/media/2019/08/02/sports-streaming-leader-emerges-espn-nbc-sports-bein-hbo-youtube-tnt (last visited Sept. 21, 2020).

143. Christian Fuchs, *Social Media and the Public Sphere*, 12 TRIPLE-C 57 (2014); *see also* YOCHAI BENKLER, THE WEALTH OF NETWORKS (2006).

144. *See, e.g.*, Erin C. Carroll, *Platforms and the Fall of the Fourth Estate: Looking Beyond the First Amendment to Protect Watchdog Journalism*, 79 MD. L. REV. 529 (2020); Connor J. Suozzo, *Red Lion Broadcasting Co. v. FCC and the Rise of Speech-Enhancing Regulations of Social Media Platforms*, 4 GEO. L. TECH. REV. 215, 238 (2019); Lili Levi, *A "Pay or Play" Experiment to Improve Children's Educational Television*, 62 FED. COMM. L.J. 275, 291 (2010); Clay

From a content standpoint, there is little role for the regulator. Nonetheless, there are examples of content regulation in the sphere of telephone communications, and in the context of all-to-all communications, it may be that the content regulation of telephony provides the most salient mileposts for analogous regulation.

There are two primary areas of telephonic regulation related to content. The more successful regulations were aimed at unwanted telephone solicitations and the range of commercial and criminal scams that accompany such calls. In 1991, in response to the growing frustration over automated telephone solicitations into the home, Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA).[145] As a recent Supreme Court case explained, the scourge of these calls has not diminished since the adoption of the TCPA.[146] "Americans passionately disagree about many things. But they are largely united in their disdain for robocalls. The Federal Government receives a staggering number of complaints about robocalls—3.7 million complaints in 2019 alone. The States likewise field a constant barrage of complaints."[147]

> In enacting the TCPA, Congress found that banning robocalls was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion." To that end, the TCPA imposed various restrictions on the use of automated telephone equipment. As relevant here, one restriction prohibited "any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice" to "any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call."[148]

---

Calvert, *The First Amendment, Compelled Speech & Minors: Jettisoning the FCC Mandate for Children's Television Programming*, 107 KY. L.J. 35 (2019).

145. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, 2394 (codified as amended at 47 U.S.C. § 227 (2012)) ("The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques"); s*ee* Justin Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech: First Amendment Lessons from the FCC's TCPA Rules*, 84 BROOK. L. REV. 1, 2 (2018).

146. Barr v. Am. Ass'n of Political Consultants, Inc., 140 S. Ct. 2335 (2020).

147. *Id.* at 2343.

148. *Id.* at 2344. (internal quotations codified at 47 U.S.C. § 227(b)(1)(A)(iii)).

The TCPA requirement of express, prior consent was originally limited to emergency purposes, but as discussed *infra*, it was amended in 2015 to allow for debt collection on behalf of the U.S. government.[149] The most significant regulatory aspect of the TCPA came in 2003 when the National Do Not Call Registry was added to the statute.[150] The implement regulations of the Registry are codified under the Telemarketing Sales Rules of the FTC.[151]

The TCPA regulations provide some interesting structural insights into the scope of regulation permitted under the Supreme Court's First Amendment jurisprudence.

> (1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct. . . .
>
> (iii) Initiating any outbound telephone call to a person when:
>
> (A) That person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or
>
> (B) That person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller or telemarketer:
>
> (1) Can demonstrate that the seller has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall

149. *See* 47 U.S.C. § 227(b)(1)(A)-(B) (emergency exceptions); § 227(b)(1)(A)(iii)-(b)(1)(B) (government debt collection exceptions); *see also* Hurwitz, *supra* note 145, at 10 ("requiring prior express consent is subject to a few statutory exceptions, including that such calls can be made for emergency purposes and for the purposes of collection of debts on behalf of the government.").

150. Do-Not-Call Implementation Act, Pub. L. No. 108–10, 117 Stat. 557 (2003) (codified as amended at 15 U.S.C. § 6101 (2012)).

151. *See* 16 C.F.R. § 310.1 *et. cet*. (2018).

> include the telephone number to which the calls may be placed and the signature of that person; or
>
> (2) Can demonstrate that the seller has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section. . . .[152]

As a result of the distinctions made among the very detailed list of abusive practices and authorized disclosures, it becomes clear that the use of the Do-Not-Call Registry has a soft spot based upon the limits of the FTC. "Placing your number on the National Do Not Call Registry will stop most telemarketing calls, but not all. Calls from or on behalf of political organizations, charities and telephone surveyors are permitted."[153] With regard to charitable solicitations, there is an additional distinction between the charity and the for-profit solicitors that charities sometimes use to conduct their solicitation:[154] "Although callers who ask for charitable contributions do not have to search the national registry, a for-profit telemarketer calling on behalf of a charitable organization must honor your request not to receive calls on behalf of that charity."[155]

The structural explanation for the inclusion of for-profit charitable solicitation within a less-restrictive version of the Do-Not-Call regulations and the complete exclusion of charities and other non-profit organizations flows from the limitations of the FTC itself, which does not have jurisdiction over such enterprises.[156] In consequence of the jurisdictional

---

152. 16 C.F.R. § 310.4(b)(1)(iii)(2018).

153. FTC, *The Telemarketing Sales Rule*, Aug. 2016, https://www.consumer.ftc.gov/articles/0198-telemarketing-sales-rule.

154. *See* Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984); Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 624 (1980) (holding as unconstitutional solicitation restrictions for nonprofits which require "that at least seventy-five per cent of the proceeds of such solicitations will be used directly for the charitable purpose of the organization."); Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781 (1988) (striking down regulation that prohibited professional fundraisers from retaining an "unreasonable" or "excessive" fee); Ill., ex rel. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600 (2003) (upholding anti-fraud actions base, in part, on the excessive solicitation fees of 85% along with other misrepresentations as to the charitable use of the funds solicited).

155. FTC, *The Telemarketing Sales Rule*, Aug. 2016, https://www.consumer.ftc.gov/articles/0198-telemarketing-sales-rule.

156. *See* 15 U.S.C. §§ 44 & 45(a); Federal Trade Commission Report to Congress Pursuant to the Do Not Call Implementation Act on Regulatory Coordination in Federal Telemarketing Laws (September 1, 2003), https://www.ftc.gov/reports/federal-trade-commission-report-congress-pursuant-do-not-call-implementation-act-regulatory (last visited Sept. 21, 2020) ("Although

impairment, the TCPA exempts calls from charities and political organizations while providing more limitation on for-profit charitable solicitors than the law exerts over other telemarketers. Interestingly, however, the lack of jurisdiction is not necessarily seen as a congressional preference. At least one court has missed the distinction, stating instead that "[f]or more than twenty years, the emergency and consent exemptions were the only statutory exemptions to the automated call ban."[157] Much like the telemarketers subject to the TCPA, this characterization is literally true and highly disingenuous.

The Congressional distinctions are certainly not viewpoint related, but they do tend to suggest that some speakers have a more preferential role in robocalling than other speakers. This suggests Congress may be more concerned about the incidental burdens on the speech of non-profit political organizations and charities than on commercial operators.

The practice of differential regulation, like that of the SBA regarding loan recipients might be permitted under the First Amendment, but these organizations are not receiving a governmental benefit. Instead, the civil and criminal penalties for conduct are being offered in different ways for the differently situated speakers.

Rather than speculating about this distinction, however, the Supreme Court has provided its own guidance on the TCPA.[158] In 2015, Congress amended the TCPA to provide yet another distinction between the various telemarketers.

> [I]n 2015, Congress passed and President Obama signed the Bipartisan Budget Act. . . .that Act amended the TCPA's restriction on robocalls to cell phones. It stated:
>
> "(a) IN GENERAL.—Section 227(b) of the Communications Act of 1934 (47 U.S.C. 227(b)) is amended—
>
> (1) in paragraph (1)—

non-profit organizations are outside the jurisdiction of the FTC, § 1011 of the USA PATRIOT Act, Pub. L. 107-56, 115 Stat. 272 (Oct. 26, 2001), expanded the Telemarketing Act's definition of 'telemarketing' to encompass any call soliciting a 'charitable contribution, donation, or gift of money or any other thing of value.'").

157. Am. Ass'n of Political Consultants, Inc. v. Fed. Commc'ns Comm'n., 923 F.3d 159, 162 (4th Cir. 2019), *aff'd sub nom*., Barr v. Am. Ass'n of Political Consultants, Inc.,140 S. Ct. 2335 (2020).

158. *Barr*, 140 S. Ct. at 2344–45 (quoting 129 Stat. 588).

> (A) in subparagraph (A)(iii), by inserting ', unless such call is made solely to collect a debt owed to or guaranteed by the United States' after 'charged for the call.'"
>
> In other words, Congress carved out a new government-debt exception to the general robocall restriction.[159]

Fittingly, the plaintiffs in the case were the American Association of Political Consultants, the trade association for-profit telemarketing counterparts to the nonprofit political organizations.[160] In a highly fractured opinion, six members of the Supreme Court agreed "that Congress has impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment."[161]

The various opinions of the decision concurred with the initial inquiry. "The initial First Amendment question is whether the robocall restriction, with the government-debt exception, is content-based. The answer is yes."[162] The plurality describes it simply:

> A robocall that says, "Please pay your government debt" is legal. A robocall that says, "Please donate to our political campaign" is illegal. That is about as content-based as it gets. Because the law favors speech made for collecting government debt over political and other speech, the law is a content-based restriction on speech.[163]

The plurality opinion was unwilling to treat the regulation as limited to speakers rather than content or as a regulation of economic activity. Nonetheless, due to the variety of opinions in the decision, the *Barr* Court could not reach a majority on whether the government debt exception to the TCPA should be assessed under strict scrutiny or under an intermediate scrutiny standard.[164]

---

159. *Id.*

160. *See* AAPC, About Us, https://theaapc.org/about-us/ (last visited Sept. 21, 2020) ("AAPC members consist of political consultants, media consultants, pollsters, campaign managers, corporate public affairs officers, professors, fund-raisers, lobbyists, congressional staffers and vendors. Membership is open to everyone associated with politics from the local level to the White House.").

161. *Barr*, 140 S. Ct. at 2343 (Justice Kavanaugh announced the judgment of the Court and delivered an opinion, in which The Chief Justice and Justice Alito join, and in which Justice Thomas joins as to Parts I and II. Sotomayor, J., concurring in judgment and Gorsuch, J., concurring in judgment in part and dissenting in part provided the majority for the decision in the case.)

162. *Id.* at 2346.

163. *Id.*

164. *See id.* at 2356 (Sotomayor, J., concurring) ("I agree with much of the partial dissent's explanation that strict scrutiny should not apply to all content-based

In the concurrence that helped provide the essential fifth vote for the outcome of the case, Justice Sotomayor rejected the new law under an intermediate scrutiny standard[165] on the basis of the law's failure to provide a narrowly tailored provision designed to serve a significant government interest and the need to privilege this one aspect of speech. In addition, she found the government had not "sufficiently justified the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, charitable fundraising, issue advocacy, commercial advertising, and the like."[166]

In the concurrence and dissent filed by Justice Gorsuch and joined by Justice Thomas, the dissent found the law unconstitutional but took a very different approach and offered a rather radical remedy. Justice Gorsuch began with the common understanding of the Court:

> First, no one doubts the TCPA regulates speech. Second, everyone accepts that restrictions on speech—no matter how evenhanded—must be justified by at least a "significant governmental interest."[167] And, third, the parties agree that laws that go further by regulating speech on the basis of content invite still greater scrutiny. When the government seeks to censor speech based on its content, favoring certain voices and punishing others, its restrictions must satisfy "strict scrutiny"—meaning they must be justified by interests that are "compelling," not just significant.[168]

Justice Gorsuch's sliding scale of government interest provides a helpful frame of reference that would likely not meet the objection of any Justice on the Court.

Justice Gorsuch goes on to find the TCPA a content restriction subject to strict scrutiny, a test it cannot pass. Justice Gorsuch, however, goes further than the majority, finding the TCPA itself unconstitutional,

---

distinctions. . . . In my view, however, the government-debt exception in 47 U.S.C. § 227(b) still fails intermediate scrutiny because it is not narrowly tailored to serve a significant governmental interest.") (internal quotations omitted).

165. *See id.* (the law 'fails intermediate scrutiny because it is not "narrowly tailored to serve a significant governmental interest.'") (internal quotations omitted).

166. *Id.* at 2357 (Sotomayor, J., concurring).

167. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (moved from the text).

168. *Barr*, 140 S. Ct. 2335 at 2364 (Gorsuch, J., concurring in part and dissenting in part).

> It's easy enough to see why the government makes no effort to satisfy strict scrutiny. Now that most cell phone plans do not charge by the call, the only justification the government cites for its robocall ban is its interest in protecting consumer privacy. No one questions that protecting consumer privacy qualifies as a legitimate and "genuine" interest for the government to pursue. . . . But before the government may censor the plaintiffs' speech based on its content, it must point to a compelling interest. And if the government thinks consumer privacy interests are insufficient to overcome its interest in collecting debts, it's hard to see how the government might invoke consumer privacy interests to justify banning private political speech.[169]

This argument cuts much more broadly into the ability of regulators to enforce the myriad of time, place, and manner restrictions that are used to regulate commercial activities on the Internet.[170] Without the challenge to the broader law, however, the plurality of justices ultimately determined that the government debt collection provision was unconstitutional, but that it could be severed from the remainder of the TCPA and left the remainder of the popular 1991 legislation untouched.[171]

Fortunately for the federal administrative agencies, the plurality opinion provides far greater comfort than the approach proposed by Justice Gorsuch. The Supreme Court allows the FTC to continue the restrictions on predatory telemarketing practices.[172] Since such conduct falls within generally recognized exceptions to the First Amendment, Congress is in its power to focus on the harms created by unfair and deceptive practices prohibited by the Federal Trade Commission Act.

At the same time, when the government undertakes to fix a perceived intrusion into the life of its residents, the variety of opinions on the court strongly suggest that there can be no preferred speakers or types of speech.

The statutory authority for the FTC and its enforcement over the FCC's TCPA regulations creates the anomaly that allows nonprofits to be exempt from the statutory provisions. Had Congress instead provided nonprofits explicit preferential treatment, the disparate interest might well have triggered another challenge to the TCPA.

---

169. *Id.*

170. *See Ward*, 491 U.S. at 791.

171. *Barr*, 140 S. Ct. at 2353–54 ("the text of the Communications Act's severability clause requires that the Court sever the 2015 government-debt exception from the remainder of the statute.").

172. *Id.* at 2349.

## IV. A MODEST PROPOSAL FOR FUTURE REGULATORY EFFORTS

The challenges for Congress and regulatory agencies to manage the content and the conduct on the Internet are overwhelming in scope as well as increasingly political in nature. Both sides of the political aisle have become increasingly focused on the broad immunity provided by §230 of the Communications Decency Act (CDA).[173] Section 230 provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[174] As a result of this provision, Congress reversed the common law presumption that a republisher of another party's content would also share in the liability for the defamatory nature of that content.[175] In fact, Congress went quite a bit further.

In the context of print publications and the pre-CDA Internet, the law made a distinction between publishers and distributors.[176]

> Ordinarily, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it. With respect to entities such as news vendors, book stores, and libraries, however, New York courts have long held that vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation.[177]

The CDA was designed to eliminate the ambiguity of determining whether online services providers and various billboard services were publishers that provided editorial control over the content or merely the vendors and distributors of their user's content. The language, however, swept much more broadly and also eliminated the common expectation that vendors and distributors of defamatory publications will be liable if they know or have reason to know of defamation.[178]

In *Zeran v. America Online, Inc.*,[179] the plaintiff argued that the language of the statute made precisely this distinction:

---

173. 47 U.S.C § 230 (2018); s*ee* George Fishback, *How the Wolf of Wall Street Shaped the Internet: A Review of Section 230 of the Communications Decency Act*, 28 TEX. INTELL. PROP. L.J. 275, 296 (2020).

174. 47 U.S.C. § 230(c)(1).

175. Cubby Inc. v. CompuServe Inc., 776 F.Supp. 135, 140–41 (S.D.N.Y. 1991).

176. *Id.* at 139.

177. *Id.* Restatement (Second) of Torts § 578 (1977).

178. *See, e.g.*, Johnson v. Arden, 614 F.3d 785, 791 (8th Cir. 2010).

179. Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).

> According to Zeran, interactive computer service providers like AOL are normally considered instead to be distributors, like traditional news vendors or book sellers. Distributors cannot be held liable for defamatory statements contained in the materials they distribute unless it is proven at a minimum that they have actual knowledge of the defamatory statements upon which liability is predicated. [W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 113, at 810 (5th ed.1984)] (explaining that distributors are not liable "in the absence of proof that they knew or had reason to know of the existence of defamatory matter contained in matter published").[180]

The Fourth Circuit rejected this more facially accurate reading of the statute because "[t]he specter of tort liability in an area of such prolific speech would have an obvious chilling effect."[181] More than the policy concerns, the court also questioned the practicality of such a ruling. "Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context."[182]

Rather than using the language of the statute or its legislative history, the *Zeran* Court made a balance of the interests of the rapidly growing Internet marketplace with the consequences of a chilling effect. *Zeran* quickly established the understanding of the statutory provision.[183] The broad immunity has swept aside the distributor immunity that exists under common law defamation for vendors and distributors of defamatory publications.[184] "The majority of federal circuits have interpreted the CDA to establish broad 'federal immunity to any cause of action that would make

180. *Id.*

181. *Id.*

182. *Id.* at 333.

183. *See* Justin Nackley, *"Oh, What A Tangled (World Wide) Web We Weave." the Dangers Facing Internet Service Providers, and Their Available Protections*, 2 SYRACUSE SCI. & TECH. L. REP. 20, 29 (2005).

184. *See Zeran*,129 F.3d at 334; s*ee also* Force v. Facebook, Inc., 934 F.3d 53,66 (2d Cir. 2019) (Facebook does not lose immunity despite its use of algorithms and editorial control to determine which content is promoted to its users); Michael Deturbide, *Liability of Internet Service Providers for Defamation in the US and Britain: Same Competing Interests, Different Responses*, J. INFO. L. TECH. 1, 29 (2000) ("judicial interpretation on the scope of section 230(c)(1) has clearly indicated that the legislation, and the policies behind the legislation, required broad protection of ISPs from liability. Following these decisions, one might justifiably assert that, because of section 230, ISPs in the US are immune from liability for content carried on their services.").

service providers liable for information originating with a third-party user of the service.'"[185]

In addition to the broad general immunity granted under the CDA to be treated as neither publishers nor distributors, section (c)(2) of the law also gave editorial immunity to Internet companies, protecting them from whatever choices they make with regard to the selection of the content they provide.[186] The immunity extends beyond defamation cases to include invasions of privacy and other potential torts. The law preempts state law but leaves intact the laws of intellectual property regulation.[187]

These protections for the ISPs fueled the rise of some of the globe's most powerful companies, including Google, Facebook, Amazon as well as Apple and Microsoft, which saw their fortunes rise with the expansion of the digital economy.

> Section 230 succeeded beyond all expectations. Amazon was just two years old and still a precocious toddler in 1996, with revenue just shy of $16 million that year; it brought in twice as much as that every hour (for a total of $70 billion) during the third quarter of 2019. Google, founded in 1998, two years after Section 230 became law, had third-quarter 2019 revenue of $40.3 billion. Facebook, founded in 2004, had $17.65 billion in third-quarter 2019 revenue.[188]

185. Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006) (quoting Zeran,129 F.3d at 330).

186. 47 U.S.C. § 230 (c)(2).

> No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph [(A)].

*Id.*

187. 47 U.S.C. § 230(e)(2) ("Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.").

188. Ellen L. Weintraub & Thomas H. Moore, *Section 230*, 4 GEO. L. TECH. REV. 625, 626 (2020) (internal citations omitted).

What was once protective legislation designed to help a nascent industry avoid crippling litigation that would kill it in the cradle, the CDA has helped fuel an economic renaissance.[189]

But the economic growth has come at some cost.[190] "Choices by intermediaries surely matter beyond their utilitarian implications. Specifically, these choices matter for how they affect human values, be it immediately in each case settled or be it in overarching terms where the whole of intermediaries' decisions transform the normative landscape by reference to which we act."[191]

Within the context of the CDA, these concerns have led politicians and others on both sides of the political aisle to call for changes to the law. For example, in May 2020, President Trump issued an executive order, calling for regulations to remove the liability shield created by section 230(c) of the CDA from social media platforms that censor speech to engage in political conduct.[192]

The Trump executive order raised concerns about bias, censorship, and misuse of power.

> Online platforms are engaging in selective censorship that is harming our national discourse. Tens of thousands of Americans have reported, among other troubling behaviors, online platforms "flagging" content as inappropriate, even though it does not violate any stated terms of service; making unannounced and unexplained changes to company policies that have the effect of disfavoring certain viewpoints; and deleting content and entire accounts with no warning, no rationale, and no recourse.[193]

President Trump was not alone. Former Vice President Joe Biden expressed a similar desire to repeal §230.[194] Biden expressed concerns about the false publications, "concentration of power," and "lack of

189. *See generally* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019).

190. *See generally* JULIE E. COHEN , BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM (2019); MARIAROSARIA TADDEO AND LUCIANO FLORIDI, THE RESPONSIBILITIES OF ONLINE SERVICE PROVIDERS (Mariarosaria Taddeo & Luciano Floridi eds., 2017).

191. Marcelo Thompson, *Beyond Gatekeeping: The Normative Responsibility of Internet Intermediaries*, 18 VAND. J. ENT. & TECH. L. 783, 820 (2016).

192. ¶ 50,343 EXECUTIVE ORDER ON PREVENTING ONLINE CENSORSHIP, Trade Reg. Rep. P 50343 [hereinafter TRUMP ORDER].

193. *Id.*

194. Editorial Board, Joe Biden, N.Y. TIMES (Jan. 17, 2020), [https://perma.cc/K8BT-PEVB].

privacy."[195] He continued about Facebook, "[i]t is propagating falsehoods they know to be false, and we should be setting standards not unlike the Europeans are doing relative to privacy."[196]

Although the perspectives from the two political leaders were quite different, they overlapped in many ways. The resulting calls for change may draw some congressional consensus that finds common ground on very modest alterations with regard to perceived abuses by the intermediaries and the growing public concerns about disrespect of consumer privacy, the growth of abusive online content, election interference, and content published to mislead the public as to its origin and authenticity. For example, FTC Chairperson Ellen L. Weintraub has described the problem as follows:

> Unlike defamation, invasions of privacy, child pornography, terrorism, or copyright violations, the democracy-damaging information ecospheres Internet companies have created are not in and of themselves illegal. Americans deserve fair elections undistorted by Internet companies, but Congress has provided no statutory guarantee of that.
>
> Thus, Internet companies' democracy-damaging actions (exploiting humans' vulnerability to outraging material, creating filter bubbles that exacerbate polarization, programming for virality, and microtargeting), being not in and of themselves illegal, could not give rise to a legal cause of action based on current interpretations of Section 230 immunity.[197]

There is a compelling need to hold the companies that operate the modern Internet accountable for their actions when those actions further the dissemination of harmful speech outside the protection of the First Amendment and when those actions further violations of criminal or civil law. Such an expectation is equally true of every business entity in the country; this is not holding the ISPs out for special treatment but merely recognizing that they have the same responsibility as all other enterprises. The civil rights of the nation's citizens must be upheld, beginning with the First Amendment. But that also means that all laws and regulations are also respected within the context of their constitutionality.

Faced with these seemingly intractable problems, Congress may wish to act with bold and aggressive legislation to tame the Internet

195. *Id.*
196. *Id.*
197. Weintraub & Moore, *supra* note 188, at 633.

behemoths. That would have the benefit of providing excellent political theater and assuring that the law would be struck down as unconstitutional, which is what happened to most of the law that accompanied Section 230.[198]

The Supreme Court held most provisions of the original CDA unconstitutional because the law was not narrowly tailored to serve a compelling governmental interest and because less restrictive alternatives were available.[199] A political rewrite of §230 to include some points of view but not others would undoubtedly provide the opportunity for political posturing, but it would be unlikely to be upheld by the Supreme Court.[200]

The modification of §230 might also be problematic. Congress could, without too much tension with the First Amendment, seek to administratively or legislatively overturn *Zeran*. Since the statute never provided any waiver of liability for content providers that knowingly disseminate defamatory material or distributing such material with reckless disregard for the truth, the standard should not run afoul of the First Amendment.[201] Under the *New York Times Co. v. Sullivan*, actual malice test, such content is not protected by the First Amendment and that should provide an opportunity for Congress to legislate or the administrative agencies to regulate in the field.[202] Similarly, the noted privacy harms common on the Internet need not have Congressional protection broader than the constitutional protections afforded privacy in *Time, Inc. v. Hill*.[203]

The *Zeran* Court correctly noted that volume of offensive content creates a burden on the distributors of this content, but in the age of multi-billion dollar enterprises, the government can reasonably decide that this is a cost that should be carried by these highly profitable institutions when weighed against the social harm created by the dissemination of knowingly false content.

To avoid the concern that the change in the law will result in an inordinate amount of self-censorship by the ISPs or widespread over-use by

198. *See* Reno v. ACLU, 521 U.S. 844 (1997); Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564 (2002); Am. Civ. Liberties Union v. Ashcroft, 542 U.S. 656 (2004).

199. *Ashcroft v. Am. Civ. Liberties Union*, 542 U.S. at 661.

200. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is an "egregious form of content discrimination [which] targets . . . particular views taken by speakers."); Tex. v. Johnson, 491 U.S. 397, 414 (1989); N.E. Pa. Freethought Soc'y v. Cty. of Lackawanna Transit Sys., 938 F.3d 424, 432 (3d Cir. 2019).

201. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

202. *Id.* at 279–80.

203. Time, Inc., v. Hill, 385 U.S. 374, 404 (1967) ("The power of a State to control and remedy such intrusion for newsgathering purposes cannot be denied.") (Harlan, J., concurring).

a thin-skinned public, the Supreme Court has again provided guidance that the government could choose to adopt.

In the area of obscene content, the law generally requires that an exhibitor or purveyor of potentially obscene materials is entitled to an adversarial proceeding and a final judicial determination that the materials are constitutionally unprotected.[204] Once the defamatory content or the invasions of privacy lose the constitutional protections of the First Amendment, the law should not continue to protect the dissemination of the content when that dissemination can result in actual harm to the individuals targeted and more generally to the public as a whole. The additional protection for the ISPs, like the pornographers they sometimes emulate, is a procedural safeguard designed to assure that these enterprises are not forced to remove content against their will.

Where the practices of obscenity extend to the laws of defamation and privacy, there would likely be some level of additional self-censorship. The same has proven true in traditional media. Many theater chains refuse to carry NC-17 content, even though its adult nature is generally considered to be separate from X-rated content.[205] Nonetheless, adult content flourishes using other distribution strategies, and the loss of defamatory and privacy-destroying content would not likely harm Facebook's or Google's bottom line. A mechanism that retained the adversarial process for assuring that content was not removed without first establishing that it is outside the First Amendment cannot intrude upon speech. In practice, it will likely only be used for a tiny fraction of the content that could be adjudicated as outside the First Amendment, but at least it would provide recourse in the most outrageous situations. As the Ninth Circuit noted, "[t]he Communications Decency Act was not meant to create a lawless no-man's-land on the Internet."[206] If the law can declare some pornography obscene, then certainly it can declare some factual misrepresentations as defamatory.

---

204. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 55 (1973) (citing Blount v. Rizzi, 400 U.S. 410 (1971); Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968); Freedman v. Md., 380 U.S. 51, 58-59 (1965); Kingsley Books, Inc., v. Brown, 354 U.S., 436 443–45 (1957); U.S. v. Thirty-Seven Photographs, 402 U.S. 363, 367-369 (1971)).

205. *The 10 Most Successful NC-17 Films*, StageBuddy, (Nov. 4, 2013), [https://perma.cc/8QQP-73HL], ("[M]ost of the large theater chains refuse to even screen films with an NC-17 rating, severely limiting those films' ability to attract audiences."); *NC-17 Rated: Stories Behind Some of Hollywood's HOTTEST Titles,* HDNet Movies, [https://perma.cc/TX9L-N69Y] (NC-17 "soon became the new 'X' rating, with distributors and movie theaters turning away films classified as NC-17. As recently as 2015, The Hollywood Reporter called the rating 'box-office poison' because the largest theater chains refuse to show films limited to those 17 years of age or older.").

206. Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1162-63 (9th Cir. 2008).

Congress, administrative agencies, and the courts should also consider the nature of the knowledge that can give rise to liability. As noted in *Cubby* and the Restatement (Second) of Torts, a distributor could be held liable if the distributor "knew or had reason to know" of the libelous content.[207] The *New York Times v. Sullivan* standard for liability use the unfortunate term "actual malice" to reflect the knowledge of falsity or reckless disregard of the truth.[208] In other settings, a common label for such awareness is labeled "scienter."[209] The labels likely reflect a common standard.[210] "The *Sullivan* actual malice standard is essentially identical to the scienter element of securities fraud because both standards require a showing of knowledge or reckless disregard of falsity."[211]

At the same time, the heightened protections afforded to speech may result in procedural differences with regard to proof.[212] *Sullivan* also

---

> A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is "responsible, in whole or in part" for creating or developing, the website is also a content provider. Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content.

*Id.* (citing Anthony v. Yahoo! Inc., 421 F.Supp.2d 1257, 1262–63 (N.D.Cal.2006)) (Yahoo! is not immune under the CDA for allegedly creating fake profiles on its own dating website).

207. *See* Cubby Inc. v. CompuServe Inc., 776 F.Supp. 135, 139 (S.D.N.Y. 1991). Restatement (Second) of Torts § 578 (1977).

208. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964)(Constitutional protections are lost for a defamatory falsehood made "with knowledge that it was false or with reckless disregard of whether it was false or not.").

209. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 319 n.3 (2007) ("Every Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly . . . .").

210. *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 502, n.19 (1984) ("Under what has been characterized as the 'honest liar' formula, fraud could be proved 'when it is shewn [sic] that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.").

211. Wendy Gerwick Couture, *The Collision Between the First Amendment and Securities Fraud*, 65 ALA. L. REV. 903, 942–43 (2014).

212. *Id.*

> The burden of proof and appellate review standard are lower in securities fraud cases than under Sullivan and its progeny. First, Sullivan requires actual malice to be shown by clear and convincing evidence. In the securities fraud context, however, scienter need merely be proven by a preponderance of the evidence. This differential evidentiary burden, which is

used a "'clear and convincing' evidentiary standard . . . —that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity."[213] The Supreme Court reinforced this requirement in *Bose Corp. v. Consumers Union of United States, Inc*.,, explaining "[t]he burden of proving 'actual malice' requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement."[214] The understanding of any revised enforcement action must clarify and reflect this pre-existing model. Distributors should be held to the scienter standard with regard to their knowledge. When the only question revolves around speech rights, then the "reckless disregard" standard under the label scienter should be used. The courts should continue to apply the heightened procedural protections of the actual malice standard, without perhaps continuing to use the term. Clarification over the application of the conduct for which the ISPs will be held responsible will narrow the focus of regulation and assure the companies and the public that mere negligence is not being criminalized.

Turning to modification of §230(c)(2), any changes to the "Good Samaritan" immunity provisions are likely much more difficult to advance. The nature of this provision expands immunity from the enforcement of censorship laws, again through the definition of publisher.

This provision protects the ISP from becoming an "Information Content Provider" as a result of its editorial control over the content on its site that the ISP finds sufficiently distasteful to host. "The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[215] When the ISP takes good-faith steps to restrict objectionable material by selectively controlling what is published or by deleting offensive content, the protections of §230(c)(2) eliminate the risk that the ISP can be now considered an Information Content Provider and subject to liability either to the original party posting the content or to any third party harmed by the content that was let posted.

The problem with §230(c)(2) is that it is presently outside the First Amendment because of its vagueness and inapplicability. Although it has a good faith requirement, the courts have not seriously questioned the availability of the legal protection on that basis. That means any content

---

> incorporated into the summary judgment inquiry, is potentially outcome-determinative.

*Id.* (footnotes omitted).

213. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986); *see* Sullivan, 376 U.S. at 285–86).

214. *Bose Corp.*, 466 U.S. at 511 n. 30.

215. 47 U.S.C. § 230(f)(3).

objectionable to the ISP can be removed by the ISP with full civil immunity. If Congress were to amend the provision, however, so that some content received this immunity, that would necessarily mean that speakers wishing to say something else were treated differently. This would not matter if it were restricted to obscenity and other forms of unprotected speech, but the disparate treatment might not withstand constitutional scrutiny if, for example, there was no civil immunity for pro-Communist speech.

The government is entitled to prefer some speakers over others, particularly when funding speech.[216] In contrast, the Supreme Court distinguished "the case of a general law singling out a disfavored group on the basis of speech content."[217] By removing the "otherwise objectionable" caveat to the section, or worse, by picking particular types of content for additional immunity and rejecting other types of content for such immunity, the government would be signaling that speech it promotes and that speech it seeks to suppress. As the Supreme Court has repeatedly noted, "the threat of sanctions may deter the exercise of First Amendment rights almost as potently as the actual application of sanctions."[218]

Such selective immunity is merely the flipside of the "right of reply" statutes declared unconstitutional in *Miami Herald Publishing Co. v. Tornillo*[219] in which the Supreme Court refused to uphold a duty to afford a political candidate the right to reply in the paper. As the Court noted in *Miami Herald*, "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers."[220] The Court made clear that a "compulsion exerted by government on a newspaper to print that which it would not otherwise print"[221] or use such rules to instruct the publisher regarding what "should not be published is unconstitutional."[222]

Selective benefits for some viewpoints or for select ISPs that avoid certain types of content are not the traditional form of viewpoint censorship

---

216. Rust v. Sullivan, 500 U.S. 173, 194–95 (1991) ("[W]e have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded.").

217. *Id.* at 194.

218. Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 588 (1983) (*quoting* NAACP v. Button, 371 U.S. 415, 433 (1963)) (internal quotation and brackets omitted).

219. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974) ("A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.").

220. *Id.*

221. *Id.*

222. *Id.*

typical of the cases involving newspapers and radio, but the principles still apply in the modern world of the many-to-many digital environment.

In *Regan v. Taxation with Representation of Washington*,[223] the Court upheld limitations on lobbying by tax-exempt organizations, explaining "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."[224] Nonetheless, the next term, in *Federal Communications Commission v. League of Women Voters of California*, the Court struck down similar editorial controls on public broadcasting stations.[225] The Court has recognized that the distinction between restrictions and benefits is narrow and sometimes illusory.[226] The axiom of Regan has narrowed considerably with time, and it narrows much, much further when viewpoints rather than blanket prohibitions are involved.

The role of Congress and administrative agencies must also be viewed both through the lens of the *Miami Herald* Court's decision to strike down the Florida right of reply statute and the more recent decisions in *Matal v. Tam* and *Iancu v. Brunetti*. *Tam* struck down the Lanham Act's restrictions on trademarks that disparaged persons, living or dead.[227] *Iancu v. Brunetti* extended the Court's restrictions on the discretion of the Patent and Trademark Office (PTO) by striking down the provisions of the Lanham Act that allowed the PTO to deny trademark registrations for immoral and scandalous matter.[228]

The *Brunetti* Court reaffirmed the position of Justice Kennedy that the Lanham Act had used viewpoint discrimination in the disparagement test because it "allowed a trademark owner to register a mark if it was 'positive' about a person, but not if it was 'derogatory.'" That was the "essence of viewpoint discrimination," he continued, because "[t]he law thus reflects the Government's disapproval of a subset of messages it finds offensive."[229]

---

223. Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983); F.C.C. v. League of Women Voters of Cal., 468 U.S. 364, 407 (1984).

224. *Id.* at 549.

225. *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. at 402.

226. *Id.* at 405 (Rehnquist, J., dissenting) ("[T]he Court today seeks to avoid the thrust of [Regan] by pointing out that a public broadcasting station is barred from editorializing with its nonfederal funds even though it may receive only a minor fraction of its income from CPB grants.").

227. Matal v. Tam, 137 S. Ct., 1744, 1764–65 (2017).

228. Iancu v. Brunetti, 139 S. Ct. 2294, 2298 (2019) ("[T]o determine whether a mark fits in the category, the PTO asks whether a 'substantial composite of the general public' would find the mark 'shocking to the sense of truth, decency, or propriety'; 'giving offense to the conscience or moral feelings'; 'calling out for condemnation'; 'disgraceful'; 'offensive'; 'disreputable'; or 'vulgar.'").

229. *Id.* at 2299 (2019) (quoting *Tam*, 137 S. Ct.at 1751–52 (opinion of Kennedy, J.).

The Good Samaritan provisions of the CDA provide precisely the same type of viewpoint discrimination as do the provisions of the Lanham Act that have been declared unconstitutional by Congress. The difference is that the language does not restrict the ISP to that objectionable content identified by Congress, but it instead offers its congressional imprimatur to any content the ISP chooses to suppress or redact. Were Congress to provide the benefit to only those viewpoints it favors rather than letting the ISP decide, the situation becomes much more like *Brunetti*.[230]

There is a difference between a governmental benefit and a restriction. That same argument, however, was made in *Tam* and *Brunetti* because trademark registration is a voluntary benefit to trademark holders that does not stop any trademark owner from using their non-federally registered mark.[231] The Court noted, however, that trademark ownership provides valuable benefits.[232] One can scarcely argue that the immunity from lawsuits under the CDA is less valuable than the protection of some defenses to trademark infringement afforded by the national registration scheme. Both provide essentially the same form of protection against legal challenges. The use of words like "lewd," "filthy," "excessively violent" (but not reasonably violent)[233] are vague and viewpoint laden. Nor did Congress want this paragraph limited to unprotected speech, since it included the clarifying explanation that the immunity was available "whether or not such material is constitutionally protected."[234]

The blanket immunity under the Good Samaritan law does not run afoul of viewpoint neutrality. Anything less than blanket immunity, however, will likely be held unconstitutional. Neither Congress nor the administrative agencies will have any success narrowing the provision to less than all speech unless it was narrowed to cover only unprotected obscenity and similar speech outside the First Amendment.

Although Congress cannot regulate content based on its viewpoint, it retains the power to regulate conduct based on its harms. The lead regulatory agency to accomplish this is the Federal Trade Commission (FTC or Commission). Congress retains the authority to hold ISPs accountable where the actions of the third parties were illegal and the ISP had knowledge of the illegal conduct. To find such a road forward, the FTC provides the government its most likely regulator.

In 1914, Congress enacted the Federal Trade Commission Act (FTC Act).[235] The authority of the FTC was expanded by Congress in

230. 47 U.S.C § 230(a)(4).

231. *Iancu*, 138 S. Ct. at 2297 ("Registration of a mark is not mandatory. The owner of an unregistered mark may still use it in commerce and enforce it against infringers.").

232. *Id.*

233. 47 U.S.C. § 230(c)(2)(A).

234. *Id.*

235. Federal Trade Commission Act, Pub. L. No. 63–203, 38 Stat. 717 (1914).

1938.[236] Section 5 of the FTC Act declares that "unfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful."[237] "The amendment added the phrase 'unfair or deceptive acts or practices' to the section's original ban on 'unfair methods of competition' and thus made it clear that Congress, through §5, charged the FTC with protecting consumers as well as competitors."[238] Although many of the actions taken by the FTC result in a settlement action or consent decree, the FTC may bring suit to prohibit an unfair business practice or a deceptive action when such settlement cannot be reached.[239] The FTC brings actions under either the unfair or the deceptive label, though many complaints reference actions that cover both.[240] "The FTC Act directs the Commission to 'prevent' the broad set of entities under its jurisdiction 'from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.'"[241]

Without attempting to regulate the content of the Internet in any way, Congress could direct the FTC to enforce the existing laws regarding cyberbullying, invasions of privacy, and similar societal harms, provided that the speech was not protected by the First Amendment. There would likely be a chilling effect, which in this case is likely the desired result of encouraging more civil and constrained behavior. After all, there is no marketplace of ideas, when all that can be heard is the shouting of an angry mob. Every marketplace has normative expectations that allow it to operate, and the various social media vendors on the Internet are no different.

---

236. Federal Trade Commission Act, Pub. L. No. 75-447, 52 Stat. 111 (codified as amended at 15 U.S.C. § 45(a) (1938)).

237. 15 U.S.C. § 45(a)(1).

238. F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (citing H.R.Rep.No.1613, 75th Cong., 1st Sess., 3 (1937) ("'[T]his amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.'").

239. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority: Enforcement Authority*, FEDERAL TRADE COMMISSION (Oct. 2019), https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority [hereinafter FTC ENFORCEMENT AUTHORITY] ("Following an investigation, the Commission may initiate an enforcement action using either an administrative or judicial process if it has "reason to believe" that the law is being or has been violated.").

240. *See* F.T.C. v. Wyndham Worldwide Corp., 799 F.3d 236, 240 (3d Cir. 2015); Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1367 (11th Cir.1988) ("[A] practice may be both deceptive and unfair. . . ."); Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 980 n. 27 (D.C.Cir.1985) ("The FTC has determined that . . . making unsubstantiated advertising claims may be both an unfair and a deceptive practice.").

241. Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 768 (1999) (citing 15 U.S.C. § 45(a)(2)).

To fulfill its duty under §5 of the FTC Act, the agency often publishes guidance, which provides non-binding but highly persuasive information that enterprises can use to understand the consequences of their commercial activities and the potential for civil or criminal penalties if they choose to ignore that guidance. For example, in *Federal Trade Commission v. Wyndham Worldwide Corp*.,[242] the FTC brought a successful action against Wyndham Worldwide Corp. for operating a data security regime that was ineffective to stop repeated cyberattacks. In response to the defense that Wyndham did not have fair notice of the FTC's position on the unfair practices involved in providing substandard security, the Third Circuit noted the FTC guidebook provided significant information and provided the defendant with fair notice.[243]

The guidance, however, merely helps to educate the public. As the court explained, "the relevant question is not whether Wyndham had fair notice of the FTC's *interpretation* of the statute, but whether Wyndham had fair notice of what the *statute itself* requires."[244]

For conduct to be determined unfair, the FTC Act looks to see if "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[245] Deceptive practices are those "involving a material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances, to the consumer's detriment."[246]

In the area of privacy and data security, the FTC has taken increasingly aggressive steps to reign in some of the most egregious behavior of the ISPs.[247] Although many critics, including the President of

---

242. *Wyndham*, 799 F.3d 240 (3d Cir. 2015).

243. *Id.* at 256.

244. *Id.* at 253–54 (italics in original).

245. 15 U.S.C. § 45(n).

> The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

*Id*.

246. FTC ENFORCEMENT AUTHORITY, *supra* note 237 (citing FTC Policy Statement on Deception, 103 F.T.C. 110, 174 (1984)).

247. *See, e.g.*, U.S. v. Facebook, Inc., 456 F.Supp.3d. 115, 117 (D.D.C. 2020) (For violating the 2012 consent decree, the FTC negotiated a new order that "would

the United States and the former Vice President of the United States, believe that Section 5 of the FTC Act is insufficient to change the behavior of the largest U.S. conglomerates, it provides an excellent alternative to the challenges regarding the implications of affecting the rights to speech of the ISPs or their consumers.

Unlike unwanted speech, which is protected by the First Amendment except for narrow categories outside the Constitution's protection, unwanted conduct can result in civil or criminal liability. In the case of Facebook, for example, a five billion dollar penalty, though small in comparison to the company's revenue, was still a dramatic increase in the assertion of FTC authority.[248]

With the guidance of Congress, the FTC could do much more. Without violating the First Amendment, it could enforce a standard of knowing complicity or reckless disregard against the corporations that facilitate breaches of existing criminal laws and civil regulations. Moreover, the FTC is not alone. The states also have state trade protection laws and consumer protection laws to expand the power of the regulations.[249] The state consumer protection acts (CPAs) significantly expand the resources beyond that of the FTC, in part because "a primary means of achieving the CPAs' consumer protection goal is the private action that empowered consumer attorneys to act as private attorneys general."[250] The addition of the interest in the states' attorneys general and the private bar would leverage the body of law established by the FTC into a practical enforcement regime, provided the FTC was successful in establishing precedent first.

The FTC has shown its ability to move cautiously, providing guidance and direction to eliminate concerns over vagueness and fair notice before moving against those companies that ignore the explicit parameters of enforcement. In doing so, the FTC can retain some relevance in the future development of the Internet, assuring that deceptive practices are not shielded by the misapplication of the First Amendment, and purveyors of harmful, unfair practices are held accountable.

The efforts of the FTC and the states must remain mindful of the rights protected by the First Amendment. Many critics of the current status of online social media may fear that this approach is not enough to protect the public from the current level of harms. Nonetheless, the Court's understanding of the First Amendment must serve as the framework in

---

require Facebook to pay a $5 billion civil money penalty—by far the largest penalty ever won by the United States on behalf of the FTC.").

248. *Id.*

249. *See* Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 173 (2011).

250. *Id.* at 165; *see also* Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Use of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 554 (1980).

which the regulators address these concerns, and there is more than enough improper conduct to keep the dockets of the FTC and the states busy for years to come. It may not be an ideal solution, but it is an important and pragmatic step forward.

## CONCLUSION

The Internet has been a boon to the modern age, creating economic opportunities, connecting people around the globe, and providing a new model of many-to-many discourse. At the same time, for many, the benefits of the Internet are being tarnished by the ease with which defamatory content, invasions of privacy, and other actions are occurring online. In the face of the conflicting success and failures of the Internet, the U.S. government has struggled to find its regulatory footing.

Congress would do well to recognize the limits created by the current jurisprudence on the First Amendment. Enacting regulations that are declared unconstitutional merely increases the delays in solutions for the public and enables those violating enforceable laws to avoid the scrutiny of the regulators. At the same time, there is a compelling need to hold everyone accountable for their actions when those actions further the dissemination of harmful speech outside the protection of the First Amendment and when those actions further violations of criminal or civil law. Such an expectation is equally true of every business entity in the country. This is not holding the ISPs out for special treatment, but merely recognizing that they have the same responsibility as all other enterprises.

Congress will not accomplish this goal by interfering with the speech rights of the ISPs, but it can use the obligations that arise under the criminal and civil statutes when a party has actual knowledge or operates with reckless disregard for the truth. By using the longstanding and effective processes of the FTC Act and holding companies accountable for the actual knowledge they acquire, the government can create a regulatory regime that is constitutional and better than the model now in use.